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OVERSIGHT OF ENFORCEMENT OF THE ANTITRUST LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

OVERSIGHT OF ENFORCEMENT OF THE ANTITRUST LAWS

THURSDAY, SEPTEMBER 19, 2002

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION,
BUSINESS AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 1:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, DeWine, and Specter.

OPENING STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. We meet today to hear from the heads of two agencies charged with the important responsibility of enforcing our Nation's antitrust laws—the Justice Department's Antitrust Division and the Federal Trade Commission.

Much has happened to the Nation's economy since our Subcommittee last met for an oversight hearing more than 2 years ago. We have seen sharp declines in the stock market, scandals affecting the leaders in the board rooms at some of our largest and our most prestigious corporations, and continued consolidation in many key sectors of the economy, including media, telecommunications, pharmaceuticals, aviation, oil and gas, and computer manufacturing.

These challenging economic times make vigorous enforcement of our antitrust laws all the more essential. In recent years, we have witnessed an incredible wave of mergers and acquisitions, touching virtually every sector of the economy.

In the decade from 1991 to 2001, the value of mergers and acquisitions reviewed by the antitrust agencies increased more than 6 times, from $169 billion to more than $1 trillion. And application of antitrust laws is not limited to corporate mergers. In industries as varied as computer software, aviation, and health care, the antitrust agencies have had to be a vigilant watchdog to ensure that the antitrust laws are properly enforced to prevent companies from stifling competition and harming consumers.

Given the merger wave of the last decade and the corporate scandals of the last year, this is not the time to be lax about enforcing antitrust laws. We will be watching closely to see how your two agencies respond to these challenges in the years ahead, Mr. James and Chairman Muris.

We are especially pleased, Chairman Muris, with the emphasis that you are placing in antitrust enforcement in the health care sector. However, we have heard a growing sense of unease about the direction of the Antitrust Division in the last year, Mr. James.

The sense of skepticism about the Division's activity is founded on several things, from a decline in actions taken by the Division, to the high-profile Microsoft settlement, to the consolidation trend in media, cable, telecom, and airlines, to name a few industries, that seems to be meeting little, if any, resistance from the Antitrust Division.

Observers have noted a sharp decline in the Division's enforcement activity. While we recognize that the number of mergers and acquisitions reported to the Antitrust Division has also diminished in the last couple of years, this decline includes a significant drop in the Division's activities in civil, non-merger, and criminal enforcement.

The Microsoft settlement is also dismaying. The settlement contains so many loopholes, qualifications and exceptions that many worry that Microsoft will easily be able to evade its provisions, and it leaves many in doubt that competition will truly be restored to the computer software market. By this action, has the Antitrust Division squandered its golden opportunity to ensure a competitive software industry, a result for which consumers will be paying a high price for years to come?

The reorganization of the Antitrust Division and streamlining of the merger review process have also raised concerns. Does the elimination of the Civil Task Force signal a diminishment of the importance of non-merger civil enforcement? Will the elimination of the Health Care Task Force result in a loss of expertise to pursue health care matters? In general, does the decline in Antitrust Division activity and the internal reorganization mean an end to the era of strong antitrust enforcement of the last decade? Of course, we hope not.

My own view is that vigorous and aggressive enforcement of our Nation's antitrust laws is essential to ensuring that consumers pay the lowest possible prices and gain the highest-quality goods and services. In this era of ever-quicker technological change and ever-increasing corporate consolidation, the need for vigorous enforcement of our antitrust laws has never been greater. We are committed to ensuring that your agencies have the necessary resources to do a good job.

The weeks and months ahead will be a crucial time for the antitrust agencies, with decisions expected in major mergers such as Echostar/DirecTV and Comcast/AT&T at the Antitrust Division, and with the FTC engaged in several important health care projects, including its work undertaken at our request to investigate allegations of anti-competitive practices in the hospital group purchasing industry.

We will be monitoring your agencies carefully, Mr. James and Chairman Muris, as you carry out your vital responsibilities on behalf of American consumers.

Let me turn now to my Ranking Member and good friend, Mr. DeWine.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, thank you very much. I want to thank you for holding this very important hearing and thank you for the leadership that you have provided as chairman of this Antitrust Subcommittee. I want to commend you again for the bipartisan way in which this Subcommittee has operated.

Over the years, we have agreed on many issues and I suppose we have disagreed on some, but this Subcommittee has been productive. It has been productive because we have always been able to work very closely together. So I look forward to continuing that work.

Before I get to the rest of my statement, I would like to thank the chairman and our witnesses for their flexibility in scheduling today's hearing and moving the time up. I am going to leave shortly to attend an Intelligence Committee hearing that is looking into the aftermath of September 11 and trying to determine where this country needs to go in the future in regard to our intelligence system. But I did want to be here to give a brief statement because vigorous antitrust enforcement is a critical part of our economic system, and oversight is a key responsibility of this Subcommittee.

We are pleased to welcome Assistant Attorney General James and Chairman Muris, of the Federal Trade Commission, to the hearing today. I appreciate the leadership that you both have provided to your respective agencies and I look forward to continuing our work together, as we have worked with the Antitrust Division and the FTC in the past.

This oversight hearing is taking place in a different economic environment than we had at our last oversight hearing. In fact, ever since Senator Kohl and I began serving on the Antitrust Subcommittee back in 1997, the economy had been in the midst of a tremendous wave of mergers and consolidations. However, today, that wave has at least to some extent abated.

Nonetheless, as Senator Kohl has stated, vigorous antitrust enforcement remains vitally important to creating and maintaining a competitive environment that will benefit our economy. In fact, in these times of corporate scandal and economic uncertainty, it is even more important that companies compete vigorously, effectively, and fairly.

The Antitrust Division and the FTC are, of course, essential to making sure that happens, and I join Senator Kohl in urging both agencies to continue actively enforcing our antitrust laws—something that I know both of you agree is very important.

I would like to briefly address two issues that I feel are particularly important. The first is the ongoing consolidation that we continue to see in the entertainment, news, and media industries. I have in the past expressed concern about concentration in these industries, and I remain today concerned.

This concentration raises particularly important public policy questions that frankly go well beyond the traditional antitrust analysis. The consolidation in the entertainment, news, and media industries has left more and more voices under the control of fewer and fewer media owners. This leaves citizens with fewer sources of the information and news that are necessary in a vibrant and open

marketplace of ideas. Senator Kohl and I are planning to hold a hearing to examine this issue, probably early next year, and I look forward to working on this important issue in our Subcommittee.

My second area of concern is in the area of civil, non-merger enforcement. I think that as we have seen a decline in the number of mergers, we are seeing an increasing number of firms turning to joint ventures or other joint conduct instead. While such arrangements differ from full-fledged mergers, they often have significant competitive impact and require similar vigorous scrutiny from the antitrust agencies.

Since these arrangements do not fall under the auspices of the Hart-Scott-Rodino Act, the agencies are not required to examine them under the statutory merger time lines. But despite the lack of statutory time lines, it is important that the agencies review these arrangements within reasonable time periods, without, of course, sacrificing careful, thorough, economically sound analysis.

Mr. Chairman, I look forward to working with you and the rest of this Subcommittee and our witnesses to ensure that such enforcement will continue.

Thank you very much.

Chairman KOHL. Thank you very much, Senator DeWine, and we appreciate your making time in your schedule to be with us today.

Our first witness this afternoon is the Honorable Charles James, Assistant Attorney General for the Antitrust Division of the Department of Justice. Mr. James was confirmed by the Senate in June of 2001. Prior to arriving at the Antitrust Division, Mr. James practiced law at Jones, Day, Reavis and Pogue's Washington, D.C., office, where he chaired the firm's antitrust and trade regulation practice. Mr. James previously spent 3 years in senior positions at the Antitrust Division during the first Bush administration, including serving for several months as Acting Assistant Attorney General for Antitrust.

Next, we will hear from the Honorable Timothy Muris, Chairman of the Federal Trade Commission. Mr. Muris was sworn into this position in June of 2001. Early in his legal career, Mr. Muris served the Commission as Assistant Director of the Planning Office, Director of the Bureau of Consumer Protection, and Director of the Bureau of Competition. Before becoming Chairman, he taught at George Mason University Law School and served as interim dean of the law school.

We thank you gentlemen for being here today, and first we will hear your testimony, Mr. James.

STATEMENT OF CHARLES A. JAMES, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. JAMES. Thank you, Chairman Kohl. It is good to be here this afternoon—Senator DeWine as well. I am gratified to have the opportunity to talk about what we have been doing over the last 15 months at the Antitrust Division on behalf of competition and consumers.

I certainly want to begin by noting my appreciation for the interest in and support of the work of the Antitrust Division from this Subcommittee, and I certainly want to echo your sentiments that

we all understand the importance of vigorous and sound antitrust enforcement.

I tried to be as exhaustive as possible in my written remarks and in our responses to your questions. I would just like to highlight a couple of issues.

In terms of our criminal program, I think you will find that it is, in fact, intact. During the course of the last fiscal year, we have filed 27 cases and we are well on our way to filing 40 or more cases, having approved an addition 5 that are still in process but have not yet been filed.

We have received $125 million in criminal fines this year, or had those imposed by the courts. We had a record year in criminal restitution—$30 million. We have continued the upward trend in jail sentences in criminal cases. Two of our sentences during the last year were record sentences, one for 10 years, and one for 5 years, for antitrust and related offenses.

Most importantly, the Division currently has 99 pending grand jury investigations in the criminal area, which is a very substantial number. And I would note that a substantial amount of our work over the years has involved these international cartel cases, and 40 of our current grand jury investigations presently involve international cartel-type issues.

Moving on to merger enforcement, as both of you have noted, the number of filings that we have received is down. During the 15 months that I have been at the Antitrust Division, we received 1,500 pre-merger transactions notified to us. That compares to nearly 5,000 in the year 2000 and over 4,600 in the year 1999.

Nevertheless, the Antitrust Division has been active. We have challenged 21 mergers, 20 of them successfully. We have also had three important compliance cases, two involving compliance with Section 7A of the Hart-Scott-Rodino Pre-Merger Notification Act, and one involving compliance with a DOJ consent decree.

Both of you have highlighted civil non-merger enforcement. I think it is important to note that when we began, there had been a very active civil, non-merger program that was consuming a great deal of resources. We have continued the expenditure of resources on those cases and litigation, but the basic pipeline was empty. During my tenure here we gave brought two significant civil, non-merger cases.

But most importantly, we have commenced, apropos to Senator DeWine's comments, a very, very close analysis of joint venture activity. We have made joint venture activity an important component of our activity. The fact of the matter is that our reorganization was designed to put more resources into civil non-merger enforcement rather than less, because we now have all of our sections focusing on civil non-merger enforcement rather than just one.

As a matter of fact, I think the data that we have provided to the Committee indicates that we have opened up civil non-merger investigations at a faster rate than at any time over the last three to 4 years, and so that program is well underway.

Now, the timeframes required to conduct these civil non-merger investigations is extensive. I think if you look back at the data that we have provided to the Committee, the average time frame for conducting investigations, during the last 4 years was between 1.9

and 2.4 years. That is too much time for consumers and the marketplace, but these matters do require careful investigation, and we are doing everything we can to expedite these investigations as appropriate.

We are very, very pleased with the strides we have made in the international area, which I know is an area that both of you have focused on. As you know, we began our tenure here with the divergence with the EU on the GE/Honeywell transaction, but we have used that divergence as a basis for stimulating a more concrete and substantive dialog with the EU, working to develop concrete proposals for achieving convergence on merger process and substance. And we see positive movement from the EC on many fronts, bringing our enforcement regimes into closer alignment.

Beyond the U.S.–EU relationship, the ICN initiative, International Competition Network, for which we are one of the driving forces together with Chairman Muris and the FTC, will have the leaders of 65 jurisdictions sitting together next week to discuss concrete proposals for convergence on pre-merger notification, merger standards, investigative process, and competition advocacy.

In effect, what we are aimed at doing at both agencies is turning talk into action. We think we have made very, very solid progress on positioning the Antitrust Division to become a more effective enforcer. We have had a reorganization and modernization. We have the merger review process initiative and very extensive best practices activity in the merger area both inside the Department of Justice and with the FTC. We have had our important policy initiatives in intellectual property remedies, coordinated effects in merger analysis, and Hart-Scott-Rodino compliance.

So I am particularly pleased to be here today with Chairman Tim Muris, who has been a very, very supportive partner in everything that we have done. I think the relationship between the Federal Trade Commission and the Department of Justice is better today than it has been in quite some time, and we are indeed looking forward to the next year and working with this Committee to make the Antitrust Division as effective as it possibly can be.

Thank you.

[The prepared statement of Mr. James appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. James.

Chairman Muris?

STATEMENT OF HON. TIMOTHY MURIS, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, D.C.

Mr. MURIS. Thank you very much, Mr. Chairman and Senator DeWine. It is a privilege to be here today before you and to be here with my good friend, Charles James. Charles and I are working, as he mentioned, on many collaborative activities and I believe he is doing an outstanding job.

Let me just summarize the FTC's testimony. I am testifying on behalf of the Commission and, of course, the answers to your questions will be my views only and not those of the Commission.

I think the FTC's record is impressive. We have a very dedicated professional staff, and I believe we have been continuing the excellent work of my predecessor, Bob Pitofsky. As you know, I am the

only Bush appointee on the Commission and, despite that, virtually every action that we take is unanimous. There is a remarkable degree of unanimity among my colleagues, and that is especially true on substantive antitrust matters.

I want to highlight today our recent history of aggressive enforcement, and I want to talk also about the special role of the FTC as an expert agency to advance the state of knowledge about various issues.

Let me begin briefly with merger enforcement. Despite the decline in the merger wave, there are still many complex mergers. In many ways, the size, scope, and complexity of mergers have increased, and if you look at merger statistics over time—I have been involved with these issues since 1974 when I first worked at the FTC—merger activity remains high, complex, and difficult in a historical sense. It is just not nearly as high as it was during the unprecedented merger wave of a few years ago.

We also have been devoting attention to non-reportable mergers. With the increase in merger notification thresholds, I believe they require more attention. We have brought cases against both non-reportable and also consummated mergers. We also have been working closely with Charles and the Antitrust Division to make the merger review process more efficient and transparent.

Turning to non-merger enforcement, given the ebbing of the unprecedented merger wave, we have been able to increase resources devoted to non-merger enforcement. We opened more than twice as many non-merger investigations last fiscal year as the Commission did in fiscal year 2000, and we have been able to maintain that pace of opening new investigations in the fiscal year that is about to end.

We have given special attention to the health care industry, and I greatly appreciate and agree completely with your comments about the importance of that industry. We have also given prominence to the energy industry. Let me just very briefly mention what we are doing in those two industries.

In energy, although the pace of energy mergers has declined, we still have had very significant consents, most recently involving Phillips and Conoco. We also are studying various issues in this industry, including the recent volatility in refined petroleum product prices. We are going to issue a report on that topic.

We also very recently, on a nationwide basis, in 360 retail markets and a significant number of wholesale markets, began tracking on a real-time basis those prices, looking for anomalies. The program has just started so it is really too early to report on it, but I have written letter to all 50 State attorneys general and gotten many letters back promising cooperation and support. I think this is an important area.

In health care, we have a very significant program. We have doubled our resources spent on health care in fiscal 2002 compared to fiscal 2001. Pharmaceuticals remains the most important area for us, but we have gotten heavily involved in other issues in health care. We have brought a significant number of collusion cases recently. We are looking at consummated hospital mergers. We held an excellent workshop recently to discuss competition issues in

health care, including the GPO issue, which I appreciate your calling to our attention.

Obviously, as I mentioned, pharmaceuticals is the most important area in terms of resources, and an extremely important area to consumers. We have brought new cases since I have been at the Commission and we have certainly expanded our efforts in the pharmaceutical area. We released an important report on the so-called Hatch-Waxman law. I know the Senate has passed an amendment to that law. I think our report is an important addition to the understanding of how that very complex subject works.

We also are very interested in high-tech and new economy issues. With the Department of Justice, we have commenced a series of hearings on competition in intellectual law and property in the knowledge-based economy. The hearings will conclude in October, and after that we anticipate issuing a report.

Let me conclude briefly by just addressing the subject of antitrust exemptions. I think, in general, they are a very bad idea. There are some efforts to have new statutory exemptions enacted. I believe that antitrust is extraordinarily important in our economy and we should not shrink its domain.

I also believe that there are some judge-made exemptions that need to be reviewed because some courts have interpreted them in an overly expansive way. We are doing that with the state action and Noerr-Pennington exemptions.

To conclude, I greatly appreciate, Mr. Chairman, the opportunity to be here. I think we are doing aggressive and important work. As I have said many times, I very much enjoy being at the Commission: The mission is important, the issues are extraordinary, and the people are great. So what is not to love about the work that we are doing.

Thank you very much.

[The prepared statement of Mr. Muris appears as a submission for the record.]

Chairman KOHL. Thank you, Chairman Muris.

My first question is for you, Chairman Muris. As you know, over the last year our Subcommittee has investigated disturbing allegations of anti-competitive practices among the large buying organizations that purchase medical equipment and devices for hospitals—what are known as group purchasing organizations or GPOs.

We held a hearing in April and received evidence of GPO practices that sometimes can indeed prevent innovative medical devices from getting to the hospitals and patients who need them—innovative products like safety needles or advanced pacemakers.

This situation, of course, is very disturbing. It is not acceptable to us to tolerate a situation in which patients and physicians could be denied the best medical devices because of anti-competitive practices by GPOs. We were pleased that last month, in response to our concerns, two of the largest GPOs committed to voluntarily change many of their contracting practices and end their conflicts of interest.

However, we also believe that vigorous antitrust enforcement is required of this industry, and that the joint FTC-DOJ health care guidelines covering the activities of GPOs need to be reviewed and

update. We are very pleased that you agreed to initiate an inquiry into the GPO industry at our request several months ago.

Chairman Muris, do you share our concern regarding the possibility of anti-competitive practices by GPOs, resulting in competitive device manufacturers being denied access to the hospital marketplace, and could you please describe your agency's plans with respect to investigating this issue? Will you commit to revising your health care guidelines on this subject if anti-competitive practices are shown to exist?

Mr. MURIS. As I mentioned, Mr. Chairman, I greatly appreciate your bringing this issue to our attention. I think it is an important one. As you know, we certainly are looking broadly at the issue. We also obviously will look at the healthcare guidelines to see whether they need to be changed.

We recently held a panel during which several experts discussed the complexities of the issue. Participants included representatives from the GAO, people in the industry, and observers of the practice. I have read a great deal about it myself.

I think we will looking at this issue fully, and I obviously commit to doing so. I don't know where the Commission is headed in its review. We will have to let the facts speak for themselves, but I do know that it is an important issue and we are looking at it closely.

Chairman KOHL. Mr. James, as these are joint Justice Department-FTC guidelines, will you pledge to work with the FTC on this issue?

Mr. JAMES. Senator Kohl, when we received your letter making an inquiry the matter was cleared to the FTC. We indicated in our response to you that we would be happy to work with the FTC and support them in this effort, as they deem appropriate, so that as their analysis goes forward we have our policy people keeping track of what is going on and consulting with the FTC. We are certainly happy to work with the FTC to improve the guidelines, if that is what the evidence and their investigation and their general policy review indicates.

Chairman KOHL. Chairman Muris, millions of Americans are disturbed nearly everyday in the privacy of their homes by annoying telemarketing telephone calls. It is a problem that has gotten out of control. The average American receives two to three telemarketing calls everyday, and my experience is that I often receive even more than that.

Some estimate that the telemarketing industry is able to make 560 calls, computerized, per second, which is roughly 24 million calls a day. So it is no wonder that people feel like they are oftentimes under siege in their own homes.

We understand that the FTC wants to establish a national "do not call" list which would stop some, but not all, telemarketing calls. So let's talk about it a little bit.

What needs to be done to stop all of these calls? If this is the No. 1 consumer protection issue in the country—and if it is not, it is close—and if we need a uniform rule without exceptions and loopholes, then would you say that Congress must act in order to implement a stronger rule? What is it you are doing, what is it that needs to be done? Is it a desirable goal to enable every home in

America, if it so wishes, to be able to block telemarketing calls as completely as it so wishes, with maybe just a few exceptions like charitable calls? What would you tell us today on this huge issue about which virtually every American home is listening to what you have to say?

Mr. MURIS. It is a very important issue, Mr. Chairman. We have never received so many unsolicited comments so quickly as we have on the "do not call" issue. We are in the final stages internally of making decisions on the parameters and the various issues involved with the rule.

In terms of some of the specifics that you have referenced, our rule, couple with now the Federal Communications Commission proposal, would, we believe, address about 80 percent of the phone calls. One of the biggest areas, quite frankly, that we cannot legally address involves phone calls involving political campaigns and political fundraising.

The charities are an issue, and I believe that both legally and constitutionally charities should be subject to our rules, but that they need to be treated differently. Most of the States have some exemption for charities. That doesn't mean you necessarily have a total exemption, but perhaps you can do it on a charity-by-charity basis, leaving that up to the consumer.

As I said, we will move shortly, but what we do need from Congress is the authority to spend the money. I know you are on our appropriations Subcommittee, so this is highly relevant. The law allows us to have our rulemaking, but we can't spend the money we need without your authority. We can't afford to do the "do not call" rule, to implement it, without authority of Congress to spend the money.

I am concerned by some of the discussion of a possible very long-term continuing resolution because if that happens and if we don't receive authority to spend the money on that CR, then the "do not call" list will be delayed.

Chairman KOHL. How much money are you talking about?

Mr. MURIS. Well, it is not new money. We are raising the money through fees. It will be somewhere in the neighborhood of $10 to $12 million. It will be through fees, so it will be no new money for Congress. But obviously an agency cannot spend money without the authority of law. That is in the Constitution as well as the law, and so it will require the Congress to give us the authority to spend the money.

As Congress is wrapping up its appropriations bills, and as it looks fairly clearly that there is going to be some sort of continuing resolution, the longer the continuing resolution leaves us without the authority to spend the money, then, of course, the whole process could be delayed.

Chairman KOHL. All right, we will get back to you in just a minute on this. Senator Specter has arrived. He cannot stay too long and he would like to make a statement.

Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, thank you very much, Mr. Chairman. I commend you for scheduling this hearing on this very, very important subject and bringing two key antitrust enforcers into the hearing room.

These are enormously important subjects, and regrettably there is so very little time for oversight with all the other work which we have before us. The homeland security issue and our oversight on the Foreign Intelligence Surveillance Act and the Intelligence Committees have sort of sucked all the air out of Washington on so many, many other things. I have other commitments that I have to excuse myself for, but I wanted to come by to say that I will be following it closely with the record and with staff.

I have one question which I would like to ask both of you gentlemen. I hear recurring complaints from a variety of sources about the length of time that investigations take. When a company is subject to an investigation, it puts them on hold on many of the items on their agenda, such as raising capital, which is especially tough now.

I know that you cannot put any time limit on investigations. It can't be done. I have done enough work in the investigative field both as district attorney and in the Senate to know that you investigate until you conclude what you have to do.

But the question I have for each of you is, is it a fair request for companies or for Senators to inquire as to a termination date, whether you can give it or not? Is that a fair request or do you think that that is inappropriately intrusive?

Mr. James, we will start with you.

Mr. JAMES. I think you have to divide the merger and non-merger world into separate pieces. I think it can be a fair request, Senator, if the parties are prepared to do what is necessary to bring the investigation to a conclusion.

Our Merger Review Process Initiative is intended to do just that; that is to say, that we meet with the parties at a very early time. We try to work with them on a schedule for getting done what needs to get done. If they are willing to cooperate to provide information on particular dates and commit to do that, and if they are willing to make their executives available for depositions within the timeframes we need, we are prepared to agree to a particular date upon which the investigation will conclude. That is something that we think we have gotten very, very positive responses on from the business community.

On nonmerger civil investigations, part of the problem is that many parties believe that until the investigation concludes, they are winning. So they have this tendency to try to take the agencies on what I call the "long stroll through the park."

We are taking aggressive steps to change that practice. I discovered recently that it has been quite some time since the Antitrust Division has ever sought to move to compel somebody to comply with some of our CIDs, and I have talked to our staff very aggressively about making sure that our CIDs are complied with promptly, that we take the important investigative steps to make that pos-

sible, and that we move people along in these merger investigations.

The data indicates that these investigations are taking between 1.9 and 2.4 years, on average. I think that is too long in a fast-paced economy, and we are doing everything we can to expedite things.

Senator SPECTER. Well, I think that is a very good position, reasonable and equitable, looking for cooperation and being willing to move it along as fast as you can. I think that is fine.

Mr. Muris, would you concur with that?

Mr. MURIS. Yes, Senator, and I commend Charles for his leadership in this area. We also have been active here. One of the things we have done recently to hold a series of workshops around the country to get away from individual cases, talk generally about our merger investigations, about how we can do them better and faster.

In a non-adversarial setting, we have been receiving some very good comments and suggestions. For example, some people have told us, discussed our standard second request—they have sort of done an anthropology and gone back and said, well, you added this specification in 1987, and then this one, and maybe you ought to rethink the package. Those are useful comments and they are easier to deal with when we are in a non-adversarial setting rather than not in the context of an individual case.

Senator SPECTER. Thank you very much. Thank you for those answers, and thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Specter.

I would like to come back, Mr. Muris, to these incessant calls being made across the country. You are saying you are in the advanced stages of a rulemaking process which, when concluded, if you will have adequate funding to implement that rule, you will be able to eliminate some 80 percent of these calls across the country? How will that work?

Mr. MURIS. Well, for people who register on the list, and if the——

Chairman KOHL. People will then have to call. How will this work if I want to be on that list of non-call?

Mr. MURIS. There will be several ways and we could put you very early on the list.

[Laughter.]

Mr. MURIS. We will certainly have a number for people to call in Washington. There are now 25 States that have "do not call" statutes, several of them very recently passed, and we are talking extensively with the States about harmonizing. One of the things that we hope to be able to do is have the people who are already signed up on State lists registered on our list.

When the rule is implemented, it will be very simple to put yourself on the list. You call your State or us, and then the telemarketers will have an obligation under the Telemarketing Sales Act to check the list—and, again, we are still working out the final details and haven't taken the final votes. If they do not comply, if they call people who are on the list, they will be violating the Telemarketing Sales Act.

Chairman KOHL. They will be subject to severe fine?

Mr. MURIS. Yes, and we have already tentatively budgeted a very large number of people, again assuming we get these funds, a large number of FTE for initial enforcement. Of course, we will work with the telemarketing industry, work with the States to go through an education process, both informing the consumers and informing the telemarketers about the new requirements of the rule. And those who don't comply, we will have aggressive enforcement.

Under the Telemarketing Sales Act, the States can enforce our rule and we expect that what many of them will do, as well, is pass a State law that would, in essence, make violation of our rule a violation of the State law. So we expect quite a bit of cooperation from the States, from the industry, education to consumers, and enforcement as it is needed.

Chairman KOHL. When one calls, will they then be placed immediately on this so-called national registry?

Mr. MURIS. Yes, when the rule goes into effect. We don't want to encourage anyone to call yet, but we will, we hope, on a State-by-State basis, given these various rules, be able to work with people to instruct them how to call.

We have over 4,000 people on our media list. Most newspapers and TV stations of significant size have a consumer reporter, and we will be talking to them. They are a very important group for us in educating the public. We spend slightly more than half of our resources on consumer protection, and so that is a very large part of what we do. We already have, we believe, this educational network significantly in place.

Chairman KOHL. Among the 80 percent of the calls now being placed across the country, which industries are we going to net in this?

Mr. MURIS. It is an interesting question. It is hard to get precise evidence. Obviously, a large number of calls come from financial institutions. A lot of them come from long-distance services, but there are a wide variety of industries that make so-called cold calls, which are the calls you receive from someone you don't know or you don't have a relationship with. Those are among the most prominent industries.

Chairman KOHL. Well, who won't you be able to cover, and for what reason?

Mr. MURIS. One of the biggest exempt groups involves the calls from political campaigns. The Telemarketing Sales Act effectively exempts all sorts of polling, as well as, private polling. As I mentioned, the PATRIOT Act made for-profit telemarketing on behalf of charities subject to the Telemarketing Sales Act. At least my recommendation would be to treat them differently, for both constitutional and other legal reasons. We have discussed this issue with the charities and I believe the charities are happy with what we are considering.

Chairman KOHL. Do you expect to be able to implement this rule within the next 6 months?

Mr. MURIS. We hope that we can promulgate the rule, vote it up or down, whatever, by the end of the year, and then begin the process of implementation. The actual first phone calls wouldn't occur

until sometime well into next year. We may have to promulgate the rule and wait for Congress to act on the funding issues.

I know it would be a difficult thing to do, but if there is a long-run CR past Thanksgiving well into next year, which some people are considering, if we could put a provision on it to allow us to spend this money, then it wouldn't slow down the implementation. Otherwise, the implementation will not occur.

Chairman KOHL. Until the funding is there?

Mr. MURIS. Yes.

Chairman KOHL. This $10 to $12 million that you are talking about?

Mr. MURIS. Yes.

Chairman KOHL. Well, it sounds great. I mean, that would be an alleviation of a huge problem across this country and I am very enthusiastic to hear about your advanced state of preparation to end this problem. I am looking forward to working with you and doing everything I can in the appropriations process to get that funding.

Mr. MURIS. Thank you very much, Senator.

Chairman KOHL. Thank you.

Mr. James, when you were confirmed for your position as Assistant Attorney General in charge of the Antitrust Division, no one doubted that your credentials were considerable, your qualifications were and are considerable, as was your expertise in antitrust law.

However, some were concerned whether your harsh criticism of the Government's antitrust enforcement activities in the past would mean perhaps that you would take a more hands-off approach to antitrust enforcement. Everybody preferred to give you the benefit of every doubt. However, some of your critics believe at this point that their fears have been at least partially realized. Let's go through a couple of their points.

First, they point to the Antitrust Division's own statistics which show a sharp decline in enforcement activity since you assumed your position last year. While it is true that the number of merger filings you have received has substantially declined in the last couple of years, the decline in the Antitrust Division workload is not limited to your review of mergers and acquisitions.

For example, the number of civil, non-merger investigations has declined about 30 percent from its annual average of the last 4 years of your predecessor's term. Likewise, the number of criminal cases filed with 2 weeks remaining in fiscal year 2002 is nearly half the average of the annual number of cases filed during the previous 5 years.

Do these statistics indicate that the Antitrust Division has decided to adopt a less aggressive posture with respect to antitrust enforcement?

Mr. JAMES. Senator, not at all. I am confused a little bit by the data that you report with regard to civil nonmerger investigations. The data that we have indicates that we have commenced civil nonmerger investigations at a higher rate than in the last 2 years of the Clinton administration—not that year-over-year comparisons are necessarily apples-to-apples comparisons in this business because we are not, after all, making widgets here.

But the fact of the matter is that we have a serious commitment to civil nonmerger enforcement. As I said, we reorganized the Antitrust Division in part because in the past civil nonmerger activities were expected to be conducted by one shop of about 25 lawyers. We have placed that responsibility in all of our enforcement sections and given them responsibility for specific commodities.

I think Senator DeWine mentioned that joint ventures and other kinds of collaborative activities short of mergers have become an important part of what is going on in the economy because mergers are more difficult to fund and finance in today's world. We have made that our top priority. We have perhaps more joint venture investigations underway at the present time than at any time in the recent past.

In terms of our criminal enforcement situation, we think that we have done a very good job in keeping things going. As I said, we have 99 grand jury investigations. I don't think any of the defendants who have been sentenced in Antitrust Division cases who are now getting higher sentences and in some instances record sentences feel any diminution in our efforts. Our efforts aimed at international cartel activities are continuing apace. Forty of our 99 grand juries involve international cartel activities.

I am fully committed to vigorous antitrust enforcement; our staff is as well. I think a lot of the criticism represents a view of the numbers in a variety of different ways. I think the real numbers show you that we have the investigations and we have the enforcement actions.

One of the things that we have seen in some of the characterizations of the numbers is a refusal to count in our merger challenges situations in which we have adopted a "fix it first" approach, which is something the Antitrust Division has done as a matter of policy for 20 years.

Those are real merger challenges. When parties undergo an extensive investigation and at the conclusion of the investigation decide that they are going to restructure their transaction proposal and we respond to that, that is, in effect, a merger action that is as significant as any other.

So we are very proud of our enforcement record and we think it is as vigorous as it possibly can be under the circumstances.

Chairman KOHL. I just want to read my numbers again. They don't comport with yours. It is probably more true of me than it is of you that they say figures don't lie, but liars can figure. But we are talking about me, I am sure, more than you.

Here is what I want to say again, and apparently you would disagree. The number of civil, nonmerger investigations has declined about 30 percent from its annual average of the last 4 years of your predecessor's term. Also, the number of criminal cases filed with 2 weeks remaining in this year is nearly half the average of the annual number of cases filed during the preceding 5 years.

Now, we don't have to maybe come to a definitive answer on that now, but I think we need to come to some conclusion on which numbers are——

Mr. JAMES. Senator, I would like to offer you a written clarification because I don't have the numbers right in front of me.

Chairman KOHL. OK.

Mr. JAMES. But I will represent to you today that on the civil nonmerger front our numbers are absolutely solid and we have commenced more investigations than in the past.

On the criminal side, the criminal enforcement program has gone up and down, and we don't invent the crimes, we just prosecute them. We have had a situation where in the prior administration they benefited from a change in our criminal amnesty program, which generated a number of cases, and other events.

I can tell you that our staff is doing everything humanly possible in the form of outreach in particular sectors, such as working with procurement officials to discover important criminal cases. And I think that our number at the end of the year will be perhaps, if lower, certainly within a range of an important level of enforcement.

Chairman KOHL. Just one other comment on the numbers. Is the sharp decline in the number of initial pre-merger investigations initiated by the Antitrust Division in fiscal year 2002—two-thirds less than the annual average from the years 1997 to 2000—is this attributable to the decline in pre-merger filings, or is there perhaps something else going on here?

Mr. JAMES. Actually, Senator, I do happen to have those numbers in front of me. In each of the 2-years, fiscal 1901 and 1902, we had actually commenced pre-merger investigations and issued second requests as a higher proportion of the mergers, or higher percentage of the mergers, than any of the last 3 years of the prior administration.

We issued second requests, I believe, or started investigations in roughly around 4.5 percent of mergers in 2001 and 5.31 percent in 2002. The comparable numbers for the last 2 years of the prior administration were 3.71 percent and 2.78 percent. So, actually, as a percentage of the filings we are getting, we are conducting more investigations.

Chairman KOHL. This past year, you eliminated the Civil Task Force, the unit devoted to pursuing civil, nonmerger cases, and the Health Care Task Force, the unit devoted to antitrust enforcement in the health care industry. It is my understanding that the attorneys and staff in these sections have been dispersed to other parts of the Division and will no longer solely specialize in these areas.

Is there not a danger of losing the expertise of the staff of those sections by eliminating these task forces, and does this signal a lessening of the Division's commitment to civil, nonmerger antitrust enforcement in the health care sector?

Mr. JAMES. Well, starting first with the civil, nonmerger area, one of the things that I discovered when I first began looking at this issue was that our so-called Civil Task Force was actually spending most of its time on merger enforcement. I think 70 percent of its docket was merger enforcement, in part because of the absence of a pipeline of civil nonmerger investigations at that time.

We have taken a slightly different approach, in part because we want to broaden the expertise of our sections, and, in part because we want to do what I call community policing. As Senator DeWine mentioned, these joint ventures and other forms of collaborative activity that make up nonmerger civil enforcement take place outside the context of any kind of pre-transactional reporting.

Agency lawyers must actually focus and be experts on these industries in order for them to identify the transactions that they need to investigate. In other words, transactions don't always report themselves to us.

Our reorganization by, first of all, making all of our sections responsible for the full range of civil enforcement, and second by assigning specific commodity responsibility and accountability to individual sections, has our lawyers now looking much more aggressively for opportunities to bring civil nonmerger cases. Hence the reason we have started these investigations at a faster pace than the prior administration.

With regard to health care, the Department of Justice has played a significant role in health care and continues to play a significant role. If you look at the last 10 years or so, the Department of Justice has never been particularly active on the doctor side of the provider equation. That is something that historically has been more of the focus of the Federal Trade Commission.

The situation in hospital mergers is pretty well-known to the Committee. The agencies have an unending string of lost hospital merger cases. As a matter of fact, one has not been brought in recent years.

Although we are very interested in enforcing the antitrust laws in all areas of health care, we place most of our emphasis on a portion of the health care industry that has been almost forgotten, and that is the payor side. I think many people have noted the increased concentration in the payor industry, insurance companies and managed care plans, and we have done a fair amount of outreach and are focusing our efforts on looking for significant antitrust issues in that sector.

In the past year, we have had a couple of matters where we commenced investigations and the mere commencement of the investigation caused insurance companies to decline to implement certain practices about which we had raised questions.

We think our health care program is active. The lawyers who are involved and knowledgeable about these issues continue to work on them. They have not been just dispersed arbitrarily across the Antitrust Division. They have been dispersed in a manner that has kept case teams and expertise together, and so we expect to be an excellent partner for Tim Muris in enforcing the antitrust laws with regard to the health care industry.

Chairman KOHL. All right. Mr. James, on Microsoft, in many respects your legacy is going to be defined by your settlement of the ground-breaking Microsoft case. Many people call this the antitrust trial of the century.

We think that you will agree that this settlement will not be considered a success if, at the end of the 5-year term, Microsoft retains its dominant position in the computer software industry, retaining its 95-percent market share in personal computer operating systems and its more than 90-percent share in Web browsers.

Now, I am willing to bet that Microsoft 5 years from today will be just as dominant as it is now. So my question to you is this: Are you willing to take my bet? Are you confident that Microsoft's domination will turn around and that the settlement will bring the

real competition to the computer software market that it was intended to do?

Mr. JAMES. Senator, I think one of the most important issues here is the premise of the question. The antitrust case that the Department of Justice commenced against Microsoft assumed as an initial matter that Microsoft was a monopolist in the area of operating systems, and it conceded that, there being no record or presentation to the contrary, that they had obtained that monopoly position through lawful means. The crux of the case that we brought was one that focused on certain practices that they engaged in in the exercise of the monopoly that they had.

Our settlement addresses the conduct that the court of appeals found unlawful and sustained in our case. One of the most important things to remember about this case is the very substantial way in which the court of appeals narrowed the case from its original focus. It eliminated substantial portions of the case in terms of office market monopolization, the monopoly leveraging claim, the exclusive dealing claim, and the tying claim, and the attempted monopolization claim.

I think that the case that emerged from the court of appeals was a very different one than the one that was initially brought, and we believe that our settlement will have the effect of eliminating those practices. Then the marketplace will have to determine who has what share of which markets. But we are committed to making sure it is the marketplace, and not Microsoft's private conduct, that makes that determination.

Chairman KOHL. So you say that 5 years from today under certain circumstances, if they retain their 95-percent share in computer operating systems and 90-percent share in Web browsers, under certain conditions that would be all right?

Mr. JAMES. If that is the result that the market dictates, free from unlawful restraints imposed by Microsoft, I think that is the result that we have to live with under the antitrust laws.

Chairman KOHL. While the settlement has not been approved by the court, I understand that Microsoft has agreed to implement some of the provisions right away. Just yesterday, the industry group Pro Comp wrote to you to report, quote, "at least six separate and ongoing violations of one section of the lengthy settlement agreement."

Have you been satisfied with the manner in which Microsoft has implemented the settlement thus far?

Mr. JAMES. As of this point, Microsoft is operating under the stipulation to undertake certain specific actions of the consent decree, because as you mentioned, the decree itself has not been entered. The types of actions that are the subject of the Pro Comp letter are things that are just being rolled out.

We are absolutely committed to making sure that Microsoft lives up to the letter and the spirit of our consent decree, and we have indicated to the computer industry that we expect to work with them very closely in making sure that occurs.

We have done so by reaching out to members of the computer community. We have developed a program that we call our Microsoft compliance advisory program in which when significant devel-

opments occur, we note them on our Web site and encourage people to comment.

As you noted, perhaps not coincidentally the Pro Comp letter was issued late in the day yesterday, and so we haven't had the opportunity to work with it. We have certainly been trying to encourage input from these companies, and we hope that they will work with us rather than just sort of sitting back and trying to have press events, because we think their constructive input into the process will help the consent decree operate in the way that it should.

Chairman KOHL. Will you commit to pursuing another antitrust enforcement action against Microsoft if you determine that Microsoft is engaged in additional anti-competitive practices in the future, Mr. James?

Mr. JAMES. Absolutely. When we looked at the Antitrust Division as part of our reorganization, we saw we had a computer shop that didn't handle the computer industry, but really did other things. One of the things that we have done through the reorganization is to create a cradle of expertise in that computer shop, and we also took the extraordinary step of creating a linkage between our computer shop here in Washington, our networks and technology section, and our San Francisco field office, which has good contacts and other things in Silicon Valley.

We appointed a coordinator there in the San Francisco field office and made the assistant chief of the San Francisco field office the co-assistant chief of our networks and technology section. So we are very committed to pursuing antitrust cases as appropriate in the computer industry, whether they involve Microsoft or any other significant information technology provider.

Chairman KOHL. All right. Mr. James, people, as we know, in America adore their television sets and millions of consumers will pay to subscribe to a cable or satellite television service in order to get more channels and better picture quality.

Fostering competition and ensuring a level playing field in this market is essential to discipline rates and improve service quality. Unfortunately, every year it seems we witness increased cable rates and yet another merger in this industry. Indeed, cable rates have gone up more than triple the rate of inflation since 1996. Consolidation and not competition is the trend in the subscription television market and, of course, it is troubling.

Let's focus on some of the recent merger activities in this sector. Currently, the Antitrust Division is considering a very important merger for millions of American consumers, a proposed merger by the only two companies offering satellite television, Echostar and DirecTV. In my view, this merger is highly problematic. It would create a monopoly in the satellite TV business, and therefore likely cause substantial harm to consumers of subscription television, especially those in rural areas where there is no effective cable TV competitor.

Now, Mr. James, we know that you cannot comment on a pending merger, but can you at least tell us when we can expect you to reach a decision?

Mr. JAMES. Certainly, Senator. As you point out, this is a very important transaction. At best, it is a three-to-two merger, and, as you point out, in some instances it is a two-to-one merger, and is

very important to the future direction of multi-channel video programming delivery.

I can tell you that as I sit here, there is not a single matter in the Antitrust Division at present that is consuming more resources and getting more attention than the DirecTV/Echostar transaction. What you will probably note is that in all of the areas where there is a separate antitrust review and an overlaying regulatory review, the transactions tend to get timed out according to the progress of the regulatory review. In this case, the DirecTV/Echostar proceeding at the FCC has been on and off again as they have stopped and started the clock.

We are moving to bring this investigation to a prompt conclusion and we hope to do so as quickly as possible. We have been conducting discovery as late as last week. We are looking at it very closely. We are going to reach our conclusion as quickly as possible. I don't think that it would be appropriate for me to say that it is going to be a month, 20 days, 35 days, but I can tell you that when the transaction is ripe for decision, a decision will be made and we are very serious about this transaction.

Chairman KOHL. All right. Mr. James, if allowed to merge, AT&T and Comcast will be the largest cable company in the country with more than 22 million subscribers, or about 30 percent of the Nation's cable television market. We were surprised when this week the Justice Department let the deadline for dealing with this merger pass without doing anything.

How can the Antitrust Division let such a giant merger go without even a whisper of concern or the most modest of conditions? Surely, reasonable people can agree that this deal poses some antitrust concerns.

Mr. JAMES. Senator, as I sit here, I am not quite sure what prompted the company to issue the press release that it issued yesterday. Our investigation of the transaction is continuing. As I mentioned earlier, it is fairly customary for the timing of these matters to proceed on the pace of a companion regulatory proceeding.

You may recall, for example, that the FTC's AOL/Time Warner investigation took roughly a year because of the overlaying FCC review process. Unless matters are reviewed by consent decree, it is certainly the case that we are not in a position to move against them because there is no imminent harm.

But lest there be any confusion about the status of our ongoing inquiry, when I saw this announcement in the media I directed the staff that we were to instruct the parties that the investigation is ongoing and we will bring that to a conclusion as promptly as possible.

Chairman KOHL. OK. News reports indicate that CableVision, with more than 3 million cable subscribers, is considering a sale of its cable assets. To be sure, if purchased by AOL-Time Warner or AT&T/Comcast, it will simply be a case of the big getting even bigger. So where do you draw the line?

Some would argue that these are adjacent monopolies that don't compete with each other, so therefore let them merge. Is there any level of concentration in the cable industry that you would find unacceptable? Wouldn't your analysis of the AT&T/Comcast deal per-

mit the industry to consolidate to only one national cable company if there were no ownership limits at the FCC?

Mr. JAMES. Well, again, the AT&T/Comcast transaction is ongoing. We obviously have to look in all of these transactions for instances of competitive overlap between the cable systems. We certainly look at these transactions to see whether a company that has a large number of cable systems across a number of markets could potentially have an effect on the content market.

We also look at these transactions to determine whether or not they have any impact on the commercialization of delivery technologies, like set-top box software technology. In all of these transactions, we look at them on the merits and we are looking for instances in which the transactions will have adverse competitive effects. So it is not just a matter of whether or not there is an end-to-end situation, meaning adjacent markets, but there all a whole host of horizontal and vertical issues that we examine.

Chairman KOHL. Mr. James, another issue we have recently been hearing about concerns competitive cable TV companies. These are the over-builder companies that come into a city and build a fresh, new cable system to go head-to-head with the incumbent cable company. These competitive, new over-builder cable companies say that they have been the victims of allegedly predatory practices designed to drive them out of the market by the large incumbent cable TV companies.

These practices allegedly include incumbents offering drastically reduced, below-cost pricing of programming only in the areas that these upstart competitors operate. These allegations are especially disturbing because the presence of these new competing cable companies are one of the few things that seems to restrain cable rates which continue to rise several times, as I said, above the rate of inflation.

Mr. James, what is your view of these allegations of predatory practices in the cable TV industry? Will the Antitrust Division be investigating these allegations?

Mr. JAMES. Senator Kohl, I think the types of allegations that you are talking about—predatory pricing allegations in cable over-build situations—are questions that have been raised ever since local governments have been giving out cable franchises.

There has been a fair amount of private litigation on this topic. I am not aware of very much of it that has been successful. The economic viability of a second cable operator is open to question, particularly in light of the advent of satellite delivery. There is a very stringent legal standard for proving predatory pricing in this industry and others.

But the question that you raise is an important enough issue that we need to look at periodically as the pricing structure of both cable television and other delivery systems change, and as the nature of content relationships change. I know for a fact that we have at least one circumstance in which allegations of predation involving an over-build are under investigation and we are taking a serious look at it.

Chairman KOHL. Chairman Muris, what is your view of cable consolidation?

Mr. MURIS. Certainly, Senator, it is important to view any sort of consolidation in the context of the relevant geographic markets. In some industries—and I am not, quite frankly, as familiar with cable as I am with a lot of the other industries we deal with every day—the relevant geographic markets are not national.

I do think that when you have consolidation, it is important to understand the reasons for consolidation. Sometimes, I think the consolidation goes too far, and I think the Commission has been appropriately aggressive in a bipartisan fashion on mergers—which, as you know, is our primary vehicle for dealing with the issue.

Chairman KOHL. This is for both of you, gentlemen. In the last few years, we have all seen a great wave of consolidation in the media and entertainment industries. Blockbuster deals like AOL/Time Warner, CBS/Viacom, and most recently Comcast/AT&T have become routine, and it seems like fewer and fewer companies are controlling the sources of information, news, and entertainment for the American public.

Many people are concerned about the ability of smaller independent voices to be heard or seen in today's huge, consolidated media industry. Former FTC Chairman Pitofsky held the view, a view that I happen to share, that when dealing with mergers in the media, unlike mergers in other industries such as banks, oil companies, or cereal companies, for example, we must give them a more exacting scrutiny because these mergers affect competition in the marketplace of ideas which are so central to our First Amendment liberties.

Mr. James, first of all, do you agree with that observation by Mr. Pitofsky?

Mr. JAMES. Well, if I understand former Chairman Pitofsky's remarks to indicate that the media industries are important industries and therefore they merit very close scrutiny in the merger area, I think that is absolutely correct.

If, on the other hand, former Chairman Pitofsky is suggesting that there can be an antitrust basis for analyzing a media transaction on some basis other than the economic consequences of the transaction, I am not sure that I would agree with that proposition.

The concept of diversity of viewpoints in ownership of media outlets is something that is more specifically under the province of the FCC, which regulates this as a matter of licensing and public interest determinations. Our approach to these media consolidations is to look predominantly at their economic consequences in terms of advertising, provision of service, innovation, and the types of competition-oriented concepts with which we are all familiar.

The Antitrust Division would have a very difficult basis for asserting in a legal challenge that the pure issue that was before the court was the diversity of voices in a content sense. I am not aware of any situation in which an antitrust agency has ever challenged a transaction on that basis.

But I agree with you that these are very, very important transactions. We look at them closely, and we do look at content, but not from the standpoint of diversity of content, but really the economic consequences of content.

Chairman KOHL. I am not sure Mr. Pitofsky would agree with that, but I respect your opinion.

Chairman Muris?

Mr. MURIS. I agree with Charles, but let me amplify with a couple of points. One, I have known Bob Pitofsky for a long time, since 1976. I think as chairman, his views in action were more constrained than some of his writings had been, in part because the law was a constraint. I think that is the point Charles is making.

On the other hand, I think there is a substantial overlap between the concerns that you are expressing in the context of diversity of ideas and antitrust issues in the sense that in terms of programming, in terms of consolidation, in terms of mergers, in terms of potential exclusion, you can have antitrust issues that arise in traditional terms. And I think these issues are all the more sensitive because of the sensitive nature of the industry.

Chairman KOHL. Mr. James, just to followup, aren't you concerned that the current pace of media consolidation will hamper greatly the ability of independent voices in this country to be heard? Are we in danger of just a very few companies controlling the news and entertainment choices for much of our country?

Mr. JAMES. Senator Kohl, actually during my brief 15 months with the Antitrust Division, there has been very little media consolidation because there have been very few mergers filed. But I echo concern about this, and I think what Tim and I are trying to say in our perhaps inartful way is that there can be an economic market for content. And to the extent that there is an economic market for content, for example, if you were take the production of movies, there can be economic consequences to that.

I don't know that I would be the person who would want to regulate how many dramas versus how many comedies were produced. But we certainly would look at the economic consequences of the market for the production of movies.

In other sorts of contexts, programming is provided and the medium in which it is exchanged is advertising. So the control over the outlets or the creation of the programming that sells the advertising is what we look at. But we are trying to really make a distinction between those types of economic consequences and other kinds of consequences.

But I share the concerns. I am an American citizen. I have a television in my house and I would like to see diverse and broad programming. I am just not altogether sure that it is within the Antitrust Division's scope or that the Antitrust Division has the capability to make sure that happens.

Chairman KOHL. You have a role, though.

Mr. JAMES. We certainly have a role in regulating the economic circumstances of these markets, or at least enforcing the antitrust laws as they apply to the economic circumstances.

Chairman KOHL. Do you have a role in trying to ensure the diversity of opinion that you talk about wanting to see?

Mr. JAMES. I would say that we have the role of ensuring that there are economic options available in a competitive market, sir.

Chairman KOHL. Mr. Muris?

Mr. MURIS. Again, I agree with Charles. I am not sure this is your premise, but I suppose it depends on what your baseline is.

We have had a tremendous increase in the forms of news outlets that we have, plus the Internet is a whole new world. I think it is important, to the extent that anticompetitive activities limit those options, that the antitrust laws be vigilant.

What Charles and I are partly trying to say is that, although expressed in different terms than antitrust lawyers would express it, there is a substantial overlap between concerns about diversity and the antitrust laws. In other words, some of the concerns can be presented in the economic terms that we deal with every day in the antitrust laws.

Chairman KOHL. All right, gentlemen, let's talk a little bit about airline competition.

Mr. James, one of the priorities of our work in the Antitrust Subcommittee has been airline competition. We all know that the airline industry has gone through tremendous difficulties since the tragedies of last September 11, so much so that the survival of several of the Nation's leading airlines is in doubt.

We are sympathetic to the difficulties faced by these airlines and their employees. Nonetheless, we remain committed to retaining a competitive airline market in the face of these challenges. We must not allow competition in the airline industry to be another casualty of September 11. Without real airline competition, millions of travelers are likely to suffer higher fares and diminished choice for air travel.

Recently, much attention has been focused on proposals by three large airlines—Delta, Northwest and Continental—to form an alliance. In addition, United and US Airways recently announced a code-sharing arrangement. Last year, the Antitrust Division moved to block the proposed merger between United and US Airways. Now, these two airlines want to engage in code-sharing.

What is the difference between these alliances and code-sharing and a merger? If you would not allow a merger, would you allow airlines to engage in cooperative arrangements like code-sharing and alliances, Mr. James?

Mr. JAMES. Senator Kohl, I apologize. By virtue of my former life, I have recused myself from all airline matters and that is being handled by one of my deputies.

I will say to you just as an observer that the Antitrust Division has been as aggressive in the airline industry as it has been in any industry. You pointed out the US Air/United transaction. We sent forth comments that I think the parties would view as adverse in the British Air code-share arrangement to DOT, and the DOT ultimately conditioned the transaction on many of the bases that we had suggested. We have sent comments forward opposing the antitrust transaction for the Air Hawaii transaction.

Just generally, I would note you mentioned the financial circumstances of the companies in this industry. There are circumstances in which financial condition is relevant to antitrust analysis. But as a general policy matter, in the airline industry and elsewhere, we at the Antitrust Division take the view that there is no reason to assume that the antitrust laws ought to be enforced any less vigorously in industries on a downward trend than on industries in an upward trend.

We are just calling them as we see them in this area and others, and if you would like a more specific answer to your question on code-sharing arrangements, I am certain that I can get you one.

Chairman KOHL. OK. A question on international antitrust issues. Mr. James, we have been working for the last few years to achieve greater harmonization between United States and European antitrust enforcement agencies. However, recently it seems that in several cases the European antitrust authorities have relaxed their enforcement activities and many people wonder if they are following your lead.

For example, in a development that surprised many observers, European Competition Commissioner Monti decided to approve the merger of two cruise lines, Carnival and Princess Cruises, after threatening in June to block the deal because of the dominance of the combined company.

Many are concerned that the apparent change in direction in European antitrust enforcement has been influenced by pressure from U.S. antitrust agencies. This past May, you visited Brussels and met with Commissioner Monti. During your visit, you gave an interview with the Financial Times which many observers interpreted as skepticism regarding the legal basis for the EC's investigation of Microsoft. You were also quite critical of the EC's decision to block the GE/Honeywell merger last year.

Have you attempted to influence the EC and Mr. Monti to relax their antitrust enforcement efforts, including with respect to the EC's investigation of Microsoft? How do you respond to those who are concerned that the Justice Department is urging the EC to lessen its antitrust enforcement?

Mr. JAMES. I don't think there is any basis for suggesting that we are encouraging the EC to lessen its enforcement. As we all know, Senator, we now live in a global economy and there is certainly the prospect, with 100-some-odd antitrust agencies enforcing the antitrust laws on their own terms, that we will have conflict, confusion, and divergent outcomes.

Our work with the European Union is designed to achieve policy harmonization and convergence so that the rules of competition apply equally across the board such that, in particular, nationals of one country are not disadvantaged when they attempt to compete in another.

We have made no effort to influence the European Union about any particular case. Our discussions with them are either on a policy basis or, in the context of an individual case, on a consultative, informational basis. We have discovered in the course of trying to make antitrust enforcement effective that it is important that our agencies are both getting the same information from parties who are proposing mergers. It is very important that we know the type of information that is being provided there and that they know the type of information that is being provided here.

I can assure you that we have a commitment to vigorous enforcement of the antitrust laws in the United States. I know that Commissioner Monti has the same kind of commitment in Europe, and we are certainly not encouraging him to make his enforcement lax.

Chairman KOHL. But you were critical of the EC's decision to block the GE/Honeywell merger last year.

Mr. JAMES. I was critical, I think, of the basis upon which it was done. I pointed out that it did, in fact, represent a divergence from what we understand to be appropriate competition policy; that is, policy that protects competition and not necessarily competitors. The case is under review by the European courts and we will have to see how the European courts resolve this issue.

I was not criticizing, Commissioner Monti or the European Union, but rather I think we were talking about the way in which their theory diverged from ours. We think that it is important to stimulate within the academic and intellectual and business community debate about which are the appropriate theories that should be pursued, because if we are all doing our job and the intellectual vigor of this debate is appropriate, then we will all ultimately be informed by the right intellectual thought process on these issues.

Chairman KOHL. Chairman Muris, as in so many other industries, we have seen an enormous amount of consolidation in the drug industry, most recently the merger between Pfizer and Pharmacia. Yet, prescription drug prices continue to rise.

Are you concerned with this consolidation in the pharmaceutical industry? What are the implications of this consolidation for consumers who are looking for cheaper drug prices?

Mr. MURIS. The issue of drug prices is extraordinarily important to us. As I mentioned, we have doubled our resources devoted to health care, and by far and away most of the effort is in the pharmaceutical area.

The Pfizer merger is obviously before us and at a very early stage; and so I can not comment further. I can say that we have been extraordinarily aggressive particularly, in the last year, on the issue of what we consider problems in misusing the Hatch-Waxman amendments.

We have brought several cases both before and after I arrived was there. I think those cases are an excellent example of how antitrust can indeed lower prices for consumers. We have many more investigations underway, and Congress is now paying great attention, as I mentioned before, with the Senate's passage of S. 812. So it is an extremely important area. One of the reasons we have antitrust laws is just for these kinds of situations.

Chairman KOHL. The last question, gentlemen, is I would just like to ask both of you what is your philosophy and how does it differ from the philosophy of your immediate predecessor to antitrust enforcement—you, Mr. James, with respect to Joel Klein, and you, Mr. Muris, with respect to Robert Pitofsky.

We will start with you, Mr. James. How does your approach differ?

Mr. JAMES. Well, I don't know that it necessarily does. As I know Joel, what he attempted to do at the Antitrust Division is to bring a legally-based approach to antitrust enforcement. I think he tried to the best of his ability to conduct thorough investigations, to let cases be decided by the facts, and to bring the cases where the facts and the law indicated a violation. That is certainly my approach, and so I don't know that there is much of a difference.

I think in terms of how we have done the job, we came into the Antitrust Division after it had undergone a substantial merger

wave that had caused the agency to engage in a lot of triage and not have the time to focus on process, investigative technique, and things of that nature.

I have been a professional antitrust lawyer my whole career and I have put a lot of emphasis on getting the agency in good shape with respect to organization, process, and technique. I think we have made some progress in that respect.

But I think the time to make that comparison is really at the end and not sort of at the beginning or in the middle. And I think in either case what is going to dictate the difference and result is the types of economic circumstances that we were confronted with. Joel was confronted with a merger wave and a lot of changes in the technology industries. I am confronted with a joint venture wave and I am trying to make the best out of that one.

So I think Joel and I probably have a lot of things in common in terms of our approach to antitrust enforcement and law enforcement and the importance of the antitrust laws.

Chairman KOHL. Would you have brought the antitrust case against Microsoft in the first place?

Mr. JAMES. You know, it is sort of interesting. I have read the entire record and I would know which allegations to press because I am looking at the end of the game and I can see what worked in court and what didn't work. Certainly, I have full belief in the violations that are found by the court of appeals and we are doing our best to remedy them.

Chairman KOHL. So you imagine you probably would have brought the antitrust case against them, maybe in different ways, but you would have gone to court with them?

Mr. JAMES. I would have brought a case to address the violations that the court of appeals found, absolutely.

Chairman KOHL. OK. Chairman Muris, you have the last word.

Mr. MURIS. Thank you, Senator. As I mentioned, I have known Bob Pitofsky for a long time. In 1988, we were on the American Bar Association Antitrust Section Committee to study the FTC, and I think we realized that our agreement on these issues was in probably the 85- to 90-percent range. That doesn't mean that there are not occasionally disagreements.

During the Clinton administration, I actually criticized the administration only on two merger cases and a few other cases. On one of the merger cases, Microsoft-WebTV, I criticized them for not bringing the case. On another merger case at the FTC, I criticized them for bringing the case.

But I will say there was one very important difference between Bob Pitofsky and myself that I announced when I was sworn in, which is that the Commission no longer had a majority of New York Yankee fans.

Chairman KOHL. That is serious.

Mr. MURIS. Yes, sir, it is.

Chairman KOHL. Before we end this hearing, written testimony to be entered into the record has been submitted by the Broadband Service Providers Association, the American Antitrust Institute, the Air Carrier Association, and the Renewable Fuels Association.

In addition, we have data requests that we have sent to the Department of Justice and Federal Trade Commission and the agen-

cies' responses to the data requests that we would like to enter into the record.

[The information referred to appears as a submission for the record.]

Chairman KOHL. We also have a statement that Senator Hatch has submitted and that will be included in the record.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman KOHL. The record will remain open for 1 week from today for additional statements and questions.

We thank you for coming and this hearing is adjourned.

[Whereupon, at 3:03 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Follow-up Questions from Senator DeWine to Chairman Muris Regarding the Antitrust Oversight Hearing (September 19, 2002)

1. **Joint Ventures**

In a letter sent to the FTC and the Antitrust Division in early 2001, Senator Kohl and I expressed concern with a particular type of joint venture – supplier-owned joint venture websites. Also, your testimony indicates that the FTC held a workshop on business-to-business electronic marketplaces in June 2000. The FTC followed its initial hearing with a public report and a second hearing on the topic.

(a) Please describe the proper analytical framework to examine supplier-owned joint ventures.

Answer:

The FTC analyzes joint ventures - whether supplier-owned B2Bs or other more traditional joint ventures - under the framework articulated in the FTC/DOJ Antitrust Guidelines for Collaborations among Competitors (April 2000), *reprinted in Antitrust Rep.*, April 2000 (also available at www.ftc.gov.) This framework recognizes that joint ventures ordinarily serve procompetitive purposes by enabling venture partners to obtain the scale necessary to launch new businesses or introduce new products and services that otherwise would not be forthcoming as rapidly absent the collaboration. Consumers and the economy benefit because productive resources are more quickly marshaled to increase output or introduce a new product or service.[1] Consequently, in most instances, the FTC utilizes a "rule of reason" approach to evaluate joint ventures in which any procompetitive efficiencies are weighed against the potential for competitive harm. If the former more than offsets the latter, the agency will not challenge the

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[1] Collaboration Guidelines at § 3.36. ("[A] competitor collaboration may enable firms to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would otherwise be possible.") ("In order to compete in modern markets, competitors sometimes need to collaborate. . . . Such collaborations often are not only benign but procompetitive.") Preamble at 1. The courts have also recognized the benefits of joint ventures, and the Collaboration Guidelines are consistent with case law. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994), *cert. denied.*, 115 S. Ct. 2600 (1995) (most joint ventures can produce substantial efficiencies and are thus evaluated under the rule of reason analysis); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 600 (11th Cir.), *cert. denied.*, 479 U.S. 923 (1986); *Worthen Bank & Trust Co. v. National BankAmericard Inc.*, 485 F.2d 119, 130 (8th Cir. 1973), *cert. denied.*, 415 U.S. 918 (1974) ("the initial purpose in forming the joint venture, to produce a national credit card, is obviously not illegal"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986).

arrangement.[2]

(b) What are the key competitive issues raised by supplier-owned joint ventures?

Answer:

In principle, supplier-owned joint venture B2Bs can raise several potential antitrust concerns. These concerns include: (1) the possibility that the incumbent exchange will use market power to the detriment of consumers; (2) the concern that a joint venture could facilitate collusion among its equity owners or other industry participants because of the vast amounts of real time transaction data, including price data, that is collected and that can be readily disseminated among competitors; and (3) the possibility that discriminatory membership rules, fee schedules, or product and technology standards could raise the costs of disfavored rivals. The first of these concerns can be characterized as structural, while the latter two are behavioral. Each of these concerns is discussed in the October 2000 Federal Trade Commission Staff Report, "Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces" (also available at www.ftc.gov).

(c) Should the same analytical framework to examining supplier-owned joint ventures apply across different industries?

Answer:

Yes. The analytical framework set out in the Collaboration Guidelines is robust. As the hypothetical examples provided at the end of the Guidelines illustrate, the Guidelines are sufficiently flexible to address a wide range of joint venture schemes.

(d) Several supplier-owned joint ventures allegedly employ most favored nation ("MFN") contract clauses. Do MFN clauses raise specific competitive concerns in analyses of supplier-owned joint ventures? If MFN clauses raise specific competitive concerns, please outline the concerns.

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[2] Collaboration Guidelines at §1.2. The Guidelines further establish an "antitrust safety zone" in which joint arrangements will not be challenged absent extraordinary circumstances. The agencies generally will not challenge competitor collaborations if the combined market shares of the participants account for no more than twenty percent of each relevant market in which competition may be affected. Guidelines at §4.2. The agencies will challenge restraints that are not reasonably related to the purpose of the venture. Guidelines at § 1.2.

Answer:

Generally, MFN clauses are procompetitive. In rare instances, MFN clauses might facilitate collusion by better enabling colluding firms to detect cheaters and police the anticompetitive agreement.

(d)(i) Generally, do MFN clauses impact the ability of independent competitors to compete with supplier-owned ventures?

Answer:

If competitors are disadvantaged relative to others because they are less efficient or do not offer consumers superior value, they will lose sales. The antitrust laws, however, do not condemn such harm to competitors. Rather, the antitrust laws are intended to safeguard the competitive process. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 488 (1977).

(d)(ii) In those industries where supplier-owned joint ventures contain MFN clauses, have independent competitors been able to compete effectively against the joint ventures?

Answer:

The FTC has not independently investigated this question. To the best of my knowledge, the staff has not received information suggesting that independent competitors are anticompetitively disadvantaged.

(d)(iii) Should the FTC, either alone or in conjunction with the Antitrust Division, comprehensively review the potential competitive benefits and potential competitive harms of MFN clauses in contracts that form supplier-owned joint ventures in order to provide guidance to firms before they include such terms in their joint venture contracts? Does the FTC currently have enough experience and data to conduct such a review?

Answer:

The Commission's staff, either independently or in conjunction with Antitrust Division staff, has sufficient experience in competition analysis to conduct such a review competently. A meaningful, comprehensive review, however, would require substantial resources to acquire pertinent data and perform other research. As noted above, MFN clauses are generally

procompetitive. Thus, it is doubtful that the benefits of such a comprehensive review would justify the resource cost to conduct it well.

2. Civil, Nonmerger Enforcement

Civil, nonmerger antitrust enforcement should represent an important enforcement priority for the FTC. Statistics indicate that the FTC has reduced the length of civil, nonmerger investigations in Fiscal Years 2001 and 2002 (to date).

(a) Civil, nonmerger matters require rigorous, careful analysis. Civil, nonmerger investigations, however, are not governed by statutory timelines. What steps has the FTC taken to ensure that it investigates civil, nonmerger matters thoroughly while also concluding the investigations within reasonable time periods?

Answer:

Civil nonmerger antitrust enforcement includes actions against such things as collusion, market division, and anticompetitive exclusive dealing contracts. This is an important area for FTC enforcement. The complexities of nonmerger enforcement pose a number of management challenges for the agency; however, many of these involving the best way of ensuring that investigations are thorough while at the same time not unduly time-consuming.

Because nonmerger enforcement addresses such a wide range of behavior, it is difficult to establish standardized timetables for agency investigations. The Commission staff has, instead, adopted a number of managerial techniques to ensure that the progress of each individual investigation is continuously reviewed. The most important tool here is the Workload meeting. Once every month, the Assistant Director in charge of each of the Bureau of Competition's litigating shops meets with the Director and Deputy Directors of the Bureau and the Bureau's Assistant Director for Policy and Evaluation. That session reviews the current status of each case in the shop, the next steps to be undertaken, and the timetable for future actions.

(b) List and explain generally the factors that commonly impact the length of civil, nonmerger investigations.

Answer:

The length of civil nonmerger investigations can be affected by many factors. Some particularly important ones include the following: (1) the complexity of the issue: some nonmerger practices, such as price-fixing, are relatively simple, while others, such as exclusive-dealing arrangements, involve more complex relationships and effects; (2) the novelty of the issue: some nonmerger practices, such as price discrimination, are alleged with some frequency,

while others, such as limitations on nonprice competition in the setting of a professional association, arise less often and staff may require more time to analyze them; (3) the difficulty of documentation: some nonmerger matters, such as invitations to collude, may require only simple documentation from one or two firms, while other practices, such as those alleged to facilitate tacit collusion, may require gathering complex evidence on the motivations and conduct of all the firms in an industry. The level of cooperation of the parties and others often influences the speed with which the FTC completes investigations.

(c) In civil, nonmerger matters, unlike mergers, parties are free to proceed with transactions and conduct, without notification or preclearance requirements. How does the lack of such requirements impact the time needed to conduct thorough civil, nonmerger investigations?

Answer:

Civil nonmerger matters are different from merger investigations in some important ways. Most notably, the agency normally discovers the nonmerger conduct only after it has been put into operation, and perhaps only after it has been in operation for some time. The agency does not receive prior notice that it is planned, nor (unlike premerger procedures) does it receive internal company documents that spell out the reasons for the conduct. This means that the agency must invest additional time and resources in determining just what conduct is taking place, before beginning to think about how that conduct should be judged. Nonmerger matters also differ from merger cases in a second important way. The parties to a merger normally want the transaction to go forward promptly, and so they are motivated to reach an expeditious settlement on any areas of antitrust concern. The parties to a nonmerger investigation, by contrast, have no interest in seeing the government expeditiously question their conduct, and so they have incentives to delay rather than to expedite the investigation.

3. Multichannel Video Programming Distribution

Competition in the multichannel video programming distribution ("MVPD") market impacts the rates, quality, and choices that consumers have when purchasing video programming. In the last year, the Antitrust Subcommittee has held hearings on two proposed mergers that may impact the MVPD market – the EchoStar/DirectTV merger and the AT&T/Comcast merger. In addition, there have been some allegations of anticompetitive conduct by some cable system operators that dominate in the areas that they serve (also known as cable incumbents).

(a) Cable rates have been rising in excess of the rate of inflation for several years. Cable firms often claim that rising programming costs have led to the rising cable rates. Based on the FTC's antitrust enforcement experience in

the MVPD market, in its review of the AOL-Time Warner merger for example, has the FTC found evidence that rising programming costs have driven rising cable rates?

Answer:

Commission staff did not investigate whether rising programming costs were driving rising cable rates as part of the AOL/TW matter. However, the staff has looked at this issue as part of previous investigations, *e.g., Time Warner/Turner*. Programming cost increases have been a historic cause of cable rate hikes. The inputs for some programming networks, especially sports (*e.g.*, ESPN) and news *(e.g.*, CNN or Fox News) programming are costly to acquire. Affected networks typically pass these cost increases on to cable operators. Start-up networks, on the other hand, frequently pay cable operators to carry their newly launched networks.

(a)(i) Has the FTC found evidence that consolidation in the cable industry has impacted the increases in cable rates?

Answer:

Not to my knowledge.

(a)(ii) Explain any link that the FTC has found between cable consolidation and cable rate increases.

Answer:

Cable rate increases are fueled not only by programming cost increases but also by cable operators attempting to recoup costs expended to upgrade their systems, lay additional cable, and convert existing cable to fiber.

(b) Some cable systems operators have claimed that consolidation in the cable industry would allow greater clustering of cable systems. According to cable firms, clustering would, in turn, lead to reduced costs. Has the FTC found that clustering reduces cable systems' costs?

Answer:

Clustering does not appear to contribute to cable rate increases or decreases. A principal stated rationale for clustering was for the efficient provision of telephony services by cable operators. As time has passed, however, most cable operators have either abandoned or deeply scaled back their telephony efforts.

(b)(i) Has clustering affected cable rates?

Answer:

The agency has not seen such effects.

(b)(ii) Explain any link the FTC has found between clustering and cable rates.

Answer:

The agency has not seen any link.

(c) What impact, if any, has cable consolidation had on the market for providing video programming?

Answer:

Programming networks need a certain number of subscribers at an agreed price per subscriber to cover their costs. To the extent that cable consolidation reduced the total number of operators purchasing programming, it also reduced the opportunity for new programmers to obtain the requisite number of subscribers. Moreover, because these large cable operators know that carriage is vitally important to both new and established programmers, large operators have bargained down the prices they pay for programming. This may lead to lower overall programming costs and therefore lower cable prices. It also may reduce the quality or variety of programming available to consumers. New programmers historically have complained that industry consolidation has reduced their chances for carriage. Established programmers complain that their ability to continue offering high quality programming has been reduced.

Recent technological improvements have enabled cable operators to compress signals sufficiently to offer a much larger number of networks over their existing cable system plant. The agency has not examined whether this increase in compression capability is sufficient to offset any potential anticompetitive harm that may result from a reduction in the total number of cable operators.

4. Open Access for Internet Service Providers ("ISP") Through Multisystem Cable Operators ("MSO")

As a condition for approving the AOL/Time Warner merger in 2001, the FTC required that AOL Time Warner allow open access to a certain number of independent ISPs to provide broadband service over its cable lines. Some media

reports over the summer cited complaints by some of the independent ISPs that have entered open access agreements with AOL Time Warner. The complaint revolved around AOL Time Warner's introductory pricing of its proprietary broadband services in areas where the independent ISPs have reached agreements to provide broadband over AOL Time Warner's cable lines.

(a) What is the status of AOL Time Warner in complying with the requirements of the consent decree in granting open access to independent ISPs?

Answer:

The Order requires that AOL Time Warner offer EarthLink's broadband internet service on Time Warner's twenty largest cable divisions no later than it offers AOL's own proprietary broadband service in these cable divisions. In addition, the Commission ordered AOLTW to enter into agreements, approved by the Commission, to provide cable broadband service with at least two other non-affiliated ISPs, approved by the Commission, within 90 days of offering the AOL and EarthLink services in these twenty largest cable divisions and to enter into agreements, approved by the Commission, with at least three non-affiliated ISPs, approved by the Commission, within 90 days of offering the AOL service in Time Warner Cable's remaining 19 cable divisions.

To date, Earthlink is available throughout AOL Time Warner's cable system. In addition, as required by the Commission's order, AOL Time Warner has entered into cable broadband access agreements, approved by the Commission, with the requisite number of non-affiliated ISPs, also approved by the Commission, throughout Time Warner's cable system. AOLTW has, in fact, entered into more than the required number of agreements with non-affiliated ISPs in most of Time Warner's cable divisions. Currently, four of the non-affiliated ISPs have begun offering their own cable broadband service on various Time Warner cable divisions.

(b) Are the independent ISPs that provide broadband services over AOL Time Warner's cable lines able to compete effectively with AOL Time Warner's proprietary broadband offerings.

Answer:

As noted, a number of non-affiliated ISPs have launched and are maintaining competitive cable broadband internet service on Time Warner's cable system. The agency continues to monitor the effectiveness of the order.

5. Judgment Enforcement

More and more cases are resolved by consent decrees. Assistant Attorney General

James indicated that the Antitrust Division is now undertaking a review of the entire remedy process.

(a) Does the FTC plan to undertake such a review as well?

Answer:

The Bureau of Competition conducted a study of its 1990-1994 divestiture orders and issued a report in August, 1999. More recently, the Bureau conducted a public workshop on June 18, 2002, that focused on merger remedies. The GAO recently issued the results of its own study of merger remedies in certain industries, in which it concluded that the Commission should consider further retrospective study. The Bureau is evaluating the GAO's recommendations.

(b) Does the FTC have a comprehensive scheme in place to monitor judgments and parties' compliance with the consent decrees? If the FTC has a comprehensive scheme to monitor judgments and decrees, describe the scheme.

Answer:

The Commission has a comprehensive scheme for monitoring and enforcing its orders. All FTC orders include reporting requirements in addition to their substantive provisions. The Bureau of Competition's Compliance Division is responsible for enforcing and monitoring compliance with the Commission's competition orders. (The Bureau of Consumer Protection's Enforcement Division is responsible for consumer protection orders.) The Assistant Director in charge of the Compliance Division assigns an attorney or paralegal from the Compliance Division to each competition order issued by the Commission, typically a professional who has been involved in the investigation that led to the issuance of the Commission's order and thus is knowledgeable about the parties and industry affected by the order. The Compliance Division staff monitors the respondent's compliance with its obligations pursuant to the order by reviewing monthly, bi-monthly, and/or annual compliance reports submitted by respondents, often by maintaining direct contact with the respondents or other affected parties, and, in some cases, in coordination with a monitor trustee appointed by the Commission. Compliance Division staff report routinely to the Assistant Director of BC's Compliance Division and the Deputy Assistant Directors on the status of compliance with outstanding orders. The Assistant Director keeps Bureau of Competition management informed on a regular basis.

In any individual case, questions of compliance may arise as a result of statements in a respondent's compliance report, specific complaints by the buyer of divested assets, issues raised by customers or suppliers of respondent, staff's review of the applicable trade press, or from any other source. If such questions arise, Compliance Division staff may be able to resolve the questions satisfactorily through informal means. In some cases, however, if further investigation is necessary, staff will obtain documents and other information from the parties and others,

through order reporting provisions or by using the compulsory discovery tools available to the Commission. Staff has sometimes been able to resolve the issues without resorting to more formal steps. When staff is unable to resolve the issues, however, the Commission may seek injunctive relief and civil penalties in federal district court for respondent's failure to comply.

(b)(i) If the FTC does not have a comprehensive scheme in place to monitor compliance with its judgments and consent decrees, explain whether such a comprehensive scheme is necessary, whether such a scheme would benefit antitrust enforcement, and the potential cost of such a scheme.

Answer:

Not applicable; see answer above.

(c) Absent any type of comprehensive monitoring of compliance with consent decrees, how does the FTC gather information to assess whether violations of consent decrees have occurred?

Answer:

Not applicable; see answer above.

(d) Does the FTC have a scheme in place to determine whether consent decrees that are currently in force are still useful and necessary? Describe the scheme.

Answer:

All Commission orders that include on-going conduct obligations terminate after twenty years, unless a shorter term is prescribed in the order. In addition, the Federal Trade Commission Act and the Commission's Rules of Practice provide a procedure whereby respondents can seek to re-open and modify an order, if they show that changed conditions of law or fact, or the public interest, warrant such action.

6. Impact of the HSR Improvement Act on Antitrust Enforcement

Congress reformed the Hart-Scott-Rodino Act in 2000.

(a) Describe the effects of the reforms on the FTC's merger review and enforcement efforts.

Answer:

The reforms enacted in 2000 to the Hart-Scott-Rodino Act ("HSR") were of two basic categories: (i) an increase of the reporting threshold, and (ii) reforms of the merger review process, specifically pertaining to the management of the "second request" process. The effects of the higher reporting threshold are discussed in subparts (b) and (c) below.

Regarding the Commission's merger review and enforcement efforts, a specific requirement of the 2000 HSR reforms was the establishment of procedures, by both the Commission and the Assistant Attorney General for Antitrust, Department of Justice, for expedited internal agency review of disagreements between merging parties and agency staff concerning second request modifications or compliance. Section 7(A)(e)(1)(B) of the Clayton Act, added by Public Law 106-553, requires that such internal review be conducted by a senior official who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue. The Commission assigned that function to its General Counsel. Based on limited experience to date, it appears that the new procedures, consistent with Congress' intent, may have increased the willingness of merging parties to seek review by senior agency officials of disagreements with agency staff.

More generally, the reforms enacted in 2000 have served to reinforce the Commission's efforts to streamline the merger review process and reduce burdens. As part of those efforts, the Commission held a series of public workshops on merger investigation "Best Practices," in Washington, D.C., New York City, Chicago, Los Angeles, and San Francisco. In addition, the Commission held workshops on electronics records, and on accounting and financial data. The Commission used these workshops to solicit input from a broad range of interest groups including corporate personnel, outside and in-house attorneys, economists, consumer groups, and others who have participated in the merger review process. As a result of these workshops, Commission staff will publish in the near future a report on merger best practices and conduct another workshop to discuss the findings.

(b) Have the reforms impacted how the FTC allocates resources to merger reviews? Describe any impact.

Answer:

The higher reporting threshold, along with a general slow-down of merger activity, has resulted in fewer mergers reported to the antitrust agencies. Merger review, however, continues to demand a major commitment of resources. Reported mergers continue to increase in scope, complexity, and size, and large, multifaceted transactions generally are the ones most likely to raise antitrust issues. As was the case prior to the enactment of the 2000 reforms, the bulk of the Commission's merger resources are allocated to the relatively few transactions that require full investigation and, if warranted, enforcement action. The merger staff remains fully occupied on

that front. In addition, the increase in the reporting threshold has required the Commission to devote some additional resources to the identification and review of mergers that are no longer subject to premerger requirements under HSR, but that could be anticompetitive.

(c) Describe any efforts the FTC undertakes or has undertaken to identify transactions that fall beneath the threshold for reporting under the Hart-Scott-Rodino Act, yet still raise anticompetitive concerns.

Answer:

The Commission is alert to transactions that fall beneath the HSR reporting threshold but still may harm consumers by substantially lessening competition. The merger staff employs a number of information sources to detect non-reportable transactions that may raise anticompetitive concerns, including media reports, trade reports, the Commission's established channels for receipt of consumer or business complaints, and referrals from public officials. The agency has opened several investigations into mergers that were not reportable under HSR.

(c)(i) Describe the results of any efforts described in response to question 6(c)

Answer:

In fiscal year 2002, the Commission issued an administrative complaint challenging one merger that fell below the amended HSR threshold (*MSC. Software Corp*),[3] and, in another case, authorized its staff to seek a preliminary injunction to preempt a transaction that "may or may not be reportable" under the amended HSR Act (*Meade Instruments Corp.*).[4]

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[3] *MSC. Software Corp.*, Dkt. No. D-9299 (complaint issued Oct. 10, 2001) (alleging that a dominant supplier of a popular type of advanced computer-sided engineering software acquired its only two competitors). In August 2002, the Commission accepted, and placed on the public record for receipt of comment, an agreement by MSC to settle the case by divesting a copy of its advanced software program.

[4] *Meade Instruments Corp.*, FTC File No. 021-0127; *see* FTC Press Release, May 29, 2002 (leading manufacturer of performance telescopes and Schmidt-Cassegrain telescopes in the United States proposed to acquire the number-two performance telescope provider in the U.S. and the only other supplier of Schmidt-Cassegrain telescopes). Meade subsequently agreed not to pursue such an acquisition.

7. The Role of Antitrust Enforcement in Ensuring a Competitive Marketplace of Ideas

Ensuring an open and competitive marketplace of ideas, especially in the face of ever-growing media consolidation, remains an important goal. At the hearing, you testified about the limits of the FTC and the Antitrust Division in attempting to ensure a competitive marketplace of ideas.

Please explain what role, if any, you believe the FTC, the Antitrust Division, and traditional antitrust enforcement can play to ensure that numerous, diverse, independent media sources continue to exist and that a vibrant marketplace of ideas exists.

Answer:

The Federal Trade Commission is firmly committed to promoting competition in all its aspects – and thereby advancing consumer welfare – by challenging anticompetitive conduct, including anticompetitive mergers. Competition helps ensure both low prices *and* high quality for consumers. In cases involving the media, challenges to anticompetitive mergers may also help promote a vibrant marketplace of ideas by ensuring a multitude of competitors. By challenging anticompetitive acquisitions and conduct in the media industry, the Commission ensures that consumers are protected both in their wallets and in the quality and diversity of information available to them.

8. Intellectual Property Hearings

Please provide more information regarding the nature, scope and goals of the Intellectual Property hearings the FTC recently conducted with the Antitrust Division. What next steps does the FTC anticipate resulting from the intellectual property hearings?

Answer:

Beginning in February 2002, the joint FTC/DOJ Hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy" set out to understand how to better manage the issues at the intersection of competition and intellectual property law and policy. Over the course of the next six months – and approximately 25 sessions – the hearings explored these issues through testimony from over 300 business participants, economists, and legal experts in both the patent and antitrust bars, and through more than 100 written submissions. The testimony has addressed various aspects of both: (1) business, economic, competition, and antitrust perspectives on the effects of *patent* policy on competition and innovation; and (2) business, economic, competition, and patent perspectives on the effects of *competition policy and antitrust enforcement* on competition and innovation. Participants

have recognized the useful role that the antitrust agencies can play in illuminating both these areas. At the same time, the FTC has continued to encounter cases that raise issues at the intersection of patent policy and antitrust enforcement, highlighting further the need for increased understanding.

The hearings materials are available at *www.ftc.gov/opp/intellect/index.htm.* These materials include complete lists of all panels and panelists, transcripts of panels, submissions from panelists, and public comments received from others as well. They also include Chairman Muris' speech announcing the hearings, the Federal Register notice announcing the hearings, and press releases in conjunction with the hearings.

Currently underway are three roundtable discussions designed to further an understanding of the interrelationships among the business, economic, and legal testimony that has taken place. The roundtables deal with topics already discussed at the hearings. The topics chosen are those that were raised by businesses as most likely to give rise to competitive concerns and those that could benefit from greater scrutiny, comparison, and synthesis of ideas already presented. Two of the roundtables have already taken place; a third is taking place at the FTC on Nov. 6.

The first day of the roundtables discussed possible reasons for competitive concern with the issuance of invalid (or potentially invalid) patents and competitive implications of various procedural suggestions to improve patent quality. The second roundtable discussed competitive implications of the application of certain substantive patenting doctrines, such as non-obviousness. The third roundtable discusses the antitrust analysis of various cross-licensing practices, such as grantbacks, and antitrust risks, if any, associated with jointly setting royalty fees for use of a standard before that standard has been developed.

The agencies have begun to work on a report that will analyze the materials from the hearings. The scope, contours, and nature of the report have not yet been determined, because there is much work yet to do to assimilate the wealth of material produced for the hearings and the roundtables.

9. Results of Hospital Mergers

The FTC has been reviewing the actual competitive effects of past hospital mergers.

(a) What are the preliminary results of the review?

Answer:

The FTC is actively looking at some recent hospital mergers to determine what their actual competitive effects have been. This study is still underway, and the staff does not yet have even preliminary results to report.

(b) What effect have hospital mergers had on prices, innovation, and quality of care in the markets where the FTC has reviewed the results of hospital mergers?

Answer:

Some members of the agency staff have, however, conducted retrospective examinations of individual hospital mergers in recent years. Two members of the Bureau of Economics reviewed a merger that reduced the number of hospitals in Santa Cruz, California, from 3 to 2. They concluded that this resulted in a "significant" price increase in the range of 15 to 20 percent. *See* M. Vita & S. Sacher, "The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study," 49 J. Indus. Econ. 63 (2001). Two former members of the Bureau of Competition reviewed a different merger in Grand Rapids, Michigan, and concluded that the cost savings actually achieved "have been more modest than the parties' original estimates." See D. Balto & M. Geertsma, "Why Hospital Merger Antitrust Enforcement Remains Necessary: A Retrospective on the Butterworth Merger," 34 J. Health Law 129 (Spring 2001). While these studies are suggestive, they do not support broad conclusions about the general effects of mergers in this industry.

(c) Has the FTC recently reviewed the effects of mergers on prices, output, quality, and innovation in other industries? List the industries.

(c)(i) Please provide any preliminary results that are available from any reviews listed in response to question 9(c).

Answer:

For a general review of the literature, including studies by non-FTC academics, see Pautler, Evidence on Mergers and Acquisitions (Bureau of Economics Working Paper No. 243) (FTC, Sept. 25, 2001), *available at* www.ftc.gov/be/workpapers/wp243.pdf. Dr. Pautler is a Deputy Director in the FTC's Bureau of Economics, and his paper provides a comprehensive overview of the economic literature on the effects of specific mergers.

While the available studies suggest that the Commission needs to be alert to the possibility of anticompetitive effects from mergers in many industries, there seems to be a particularly strong need for a merger retrospective in the hospital industry. Recent court decisions have given hospital mergers a favorable treatment in some particulars (the size of the geographic market; consideration of nonprofit status; willingness to accept temporary price caps as a remedy), and it is appropriate to see if those assumptions have proven valid.

10. Standards Setting

(a) Describe the FTC's efforts to police standards setting processes.

Answer:

See the answer below.

(b) What role does antitrust scrutiny of standard setting organizations themselves, along with antitrust scrutiny of their participants, play in preventing standard setting processes from creating competitive harm?

Answer:

The Federal Trade Commission recognizes that standard-setting organizations ("SSOs") make many positive contributions to the efficient development of technology. Indeed, in high-technology industries the implementation of standards is critically important due to the need for various components of a product to interoperate. Further, a standard may allow manufacturers to focus on improving a given product that has marketplace acceptance, and thereby advance innovation in that product market. Finally, standards benefit consumers by ensuring that devices are compatible and that consumers will not be stuck with unsupported, orphan technology.

SSOs, a form of collaboration between competitors, pose potential risks to competition. Such risks are inherent when competitors meet with the objective of reaching an agreement. As a result, the Commission seeks to ensure that SSO activity focuses on efficiency-enhancing standard-setting activity, and scrupulously avoids engaging in anticompetitive conduct. The Commission has viewed, and will continue to view, SSOs within this framework. When the Commission learns that an SSO participant has crossed the line from efficiency-enhancing collaboration into anticompetitive conduct, it will investigate and, if appropriate, bring enforcement action.

The Commission is currently challenging the conduct of Rambus, Inc., with respect to an SSO relating to memory chips for computers. That matter, which is in litigation before an administrative law judge within the Commission, alleges that Rambus failed to disclose various patents it held that related to the standards under consideration by the SSO, in violation of the SSO's rules. The Commission has alleged that the SSO unwittingly adopted a standard that placed Rambus in a position to reap substantial royalty fees based on those patents. The Commission has charged Rambus with monopolization and attempted monopolization.

The Commission will continue to monitor all industries for evidence of abuses of SSO

processes, and will take action in appropriate cases. By ensuring that participants in SSOs follow rules and procedures that ensure fair and open competition among various proposed standards, the Commission will help ensure that consumers receive the benefits of SSOs and prevent them from the burden of the use of anticompetitive tactics in the SSO process.

Follow-Up Questions from Chairman Kohl to Chairman Muris
Regarding the Antitrust Oversight Hearing (September 19, 2002)

1. **Chairman Muris, we have heard reports concerning allegations that some drug wholesalers are manipulating the market for certain prescription drugs, creating artificial shortages, and causing drastic price increases for these drugs. These price increases seem particularly to harm smaller hospitals and those in rural areas, the institutions with the least bargaining power. For example, this past July, National Public Radio reported that the price of a Dexamethasone injection, a common steroid used to treat pain, increased more than a hundredfold from about $1.15 a vial to $187. Are you aware of these allegations? What are your plans to investigate allegations of price manipulations and anticompetitive conduct engaged in by drug wholesalers?**

Answer:

The agency is aware of press reports that the wholesale prices of some prescription drugs have increased rapidly, possibly as a result of price manipulation. The National Public Radio report suggested that much of the problem appears to lie with smaller wholesalers who took advantage of a variety of unique situations to "corner" the market on a limited number of prescription drugs. The Commission takes such reports seriously and investigates concerns of this type to determine whether the prices result from anticompetitive behavior. When the facts warrant, the agency would not hesitate to bring an enforcement action.

2. **The Federal Trade Commission recently held a workshop on antitrust issues in health care. During the session devoted to hospital group purchasing, one of the participants, Professor Latham, suggested that the FTC revisit the Health Care Guidelines with respect to hospital group purchasing established in 1994. He stated that the current guidelines do not address any of the "effects on innovation" concerns or the consolidation that has occurred in this industry since the drafting of the guidelines. Shouldn't the FTC consider the effect on innovation in the medical device marketplace when it reviews section 7 of the FTC/DOJ Healthcare Guidelines? In addition, shouldn't the FTC consider the consolidation in the GPO industry when it reviews section 7 of the FTC/DOJ Healthcare Guidelines?**

Answer:

Professor Latham identified a number of problems that he thought might be occurring as a result of the growth and consolidation of GPOs. According to Professor Latham, these problems may not affect innovation directly, but they could tend to impede the growth of smaller suppliers, some of which could be new entrants with innovative ideas, so that anticompetitive barriers to such firms may tend to harm innovation indirectly.

In particular, Professor Latham suggested that the joint FTC-Justice Department Statement on Joint Purchasing Arrangements Among Health Care Providers ("JP Guidelines") might be worth reexamining, in two different respects. First, he suggested that the numerical thresholds in the JP Guidelines (i.e., how large a percentage of the market can any one GPO control) might be worth revisiting. In this connection he suggested empirical research to determine the point at which maximum scale economies are reached. Second, and considerably more important, he suggested that the present JP Guidelines might give manufacturers and GPOs a false sense of security. He emphasized that the current allegations against GPOs involve matters like tying, exclusive dealing, and a breakdown in fiduciary relationships. These are matters, as he said, that are largely independent of the present guidelines' focus on buyer power.

The agency is giving serious consideration to the suggestions and will look for appropriate steps to address any problems that may exist. More specifically, if problems were uncovered, the FTC would evaluate the appropriateness of possible initiatives, such as revisions to the JP Guidelines or litigation. These and other courses would be considered in light of additional fact gathering and analysis. The FTC has sufficient tools to address any problems that are identified.

3. **As you know, we recently received commitments from two of the nation's largest hospital group purchasing organizations, Premier and Novation, in which they pledged to take a number of actions to change their business practices to promote competition in hospital purchasing. We believe that implementation of these commitments will be essential to ensuring competition in this industry. Will you commit to examining the GPOs' compliance with their voluntary commitments as part of your investigation into the GPO industry?**

Answer:

Premier and Novation have formulated voluntary codes of conduct for their purchasing activities, as has the umbrella trade group, the Health Industry Group Purchasing Association. Several features of these codes appear intended to make the purchasing markets more competitive. The FTC applauds those efforts, and will closely observe their effects.

This agency is authorized to investigate specific conduct that tends to harm competition and consumers. The FTC therefore can look at particular, questionable purchasing practices by the GPOs, or particular selling practices by the manufacturers of medical devices. Part of that assessment would likely focus on whether the entity had in fact adhered to the procedures of the new codes, and, if not, what the competitive consequences had been. Thus, the Commission should be able to reach the topics covered by the most important code provisions. The agency will be alert for circumstances calling for enforcement action to preserve competition.

4. **Some antitrust experts have raised the questions as whether the government's civil remedies in antitrust cases are adequate. As we saw in the Microsoft settlement**

with the Justice Department, the only remedy in a civil antitrust proceeding brought by the government is a consent decree in which the antitrust violator pledges to cease its antitrust violation and commits not to engage in illegal activity in the future. There is no requirement that the company disgorge any profits it obtained as a result of its illegal conduct, nor are civil fines imposed. Chairman Muris, do you believe that the government's civil remedies are adequate in antitrust cases? Wouldn't it be desirable to give the government the ability to obtain disgorgement of illegally obtained gains, or to impose civil fines when it prevails in civil antitrust cases?

Answer:

The arsenal of civil remedies that is available to the Commission in antitrust cases is sufficient, in my view. In the agency's typical nonmerger enforcement action, the proper balance is struck by coupling injunctive relief with periodic reporting requirements and the agency's ability to seek civil penalties (currently $11,000 per day) for any order violation.

Further, courts in recent years have recognized the Commission's authority in antitrust cases to seek in federal court broad equitable relief, including disgorgement of ill-gotten gains and restitution for injured consumers, under Section 13(b) of the Federal Trade Commission Act. In appropriate antitrust cases involving particularly egregious conduct, the Commission has sought and obtained such relief. For example, the Commission approved on November 29, 2000 a $100 million settlement with Mylan Laboratories, Inc., one of the largest monetary settlements in Commission history, and last year the Commission approved a $19 million settlement with Hearst Corporation.

The *Mylan* settlement resolved the Commission's charges that Mylan and three other firms conspired to deny Mylan's competitors ingredients necessary to manufacture two widely prescribed anti-anxiety drugs. In addition to injunctive relief, the terms of that settlement require Mylan to pay $100 million into a fund for distribution to injured consumers and state agencies. On February 1, 2002, the federal district court granted final approval of the settlement, and on May 28, 2002, the court approved an application to distribute refunds to consumers.

The *Hearst* settlement last year resulted from the Commission's challenge in federal court of Hearst Corporation's consummated acquisition of Medi-Span; the agency charged that the acquisition of Medi-Span unlawfully created a monopoly over a key type of drug information database used by pharmacists, other health care professionals, hospitals, and health plans. Last December, the Commission approved a settlement that requires both divestiture of assets and payment of $19 million as disgorgement of unlawful profits. The settlement, which has been accepted by the court and entered as a final judgment, provides for the disbursement of the disgorged funds to those customers who were forced to pay monopoly prices for database products.

The availability of these equitable remedies, in my view, is sufficient to address the unusual, egregious cases in which injunctive relief is too limited.

5. Does economic globalization create any new consumer protection challenges, such as cross-border fraud?

Answer:

Cross-border fraud is indeed a growing and substantial challenge. The development of the Internet and improvements in telecommunications permit fraud to be committed on a large scale, not just across state borders, but also across national ones. Fraud perpetrators can quickly, cheaply, and often anonymously, set up shop overseas. They can then target a bigger market, and also take advantage of greater obstacles to investigation and prosecution.

The increasing international aspects of fraud mirrors what happened in the cartel area decades ago. International cartels avoided meeting in the United States because the United States is very aggressive in investigating and prosecuting cartel activity, because the United States' sanctions are severe, and because foreign antitrust authorities may lack the resources to detect and investigate cartel activity.[1] A similar phenomenon is happening with fraud: international transactions are more difficult to detect and prosecute.[2]

(a) If so, what are the key obstacles to prosecuting cross-border fraud?

Answer:

The obstacles the agency confronts in fighting cross-border fraud are similar to those that arose years ago with international cartels.

- First, evidence about cross-border fraud is typically spread out among different jurisdictions. Yet, consumer protection enforcers face numerous legal and practical barriers in obtaining and consolidating such evidence for effective enforcement. Countries should eliminate barriers that prevent consumer protection enforcers from collecting and sharing more information about cross-

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[1] *See* International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust (2000), Chapter 4, notes 6,7 and 29, *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm.

[2] The importance of convergence in cross-border fraud enforcement was a topic of a recent speech I presented before the Fordham Corporate Law Institute's Annual Conference on International Antitrust Law and Policy. *See* "The Interface of Competition and Consumer Protection," Prepared Remarks of Timothy J. Muris, Chairman, Federal Trade Commission (Oct. 31, 2002), *available at* http://www.ftc.gov/speeches/muris/021031fordham.pdf.

border fraud.

- Second, in some countries it is unclear whether consumer protection agencies have jurisdiction to act against cross-border fraud. The inability to take action hurts consumers; for example, fraudulent companies can set up shop in one country and target only consumers in another. Countries should address gaps in the legal ability of their consumer protection agencies to exercise jurisdiction in cases involving cross-border fraud.

- Third, consumer protection agencies face obstacles in enforcing remedies across borders. A court whose injunction is ignored by a foreign defendant can hold the defendant in contempt of court, but this sanction has little value if the defendant is overseas and is not subject to extradition.[3] Enforcers also face difficulties in depriving wrongdoers of their ill-gotten gains and returning money to consumers in the form of redress. One of the problems is that fraud proceeds move off-shore quickly. Countries should explore procedures for preventing the transfer of assets abroad and repatriating assets that have already been transferred.

(b) Why is fighting cross-border fraud important?

Answer:

Pursuing cross-border fraud is important for several reasons.

- First, cross-border fraudsters now cause substantial injury to American consumers. Fighting such fraud helps protect those consumers.

- Second, consumers' concerns about fraud in the global marketplace can undermine consumer confidence in the growing global marketplace. Such concerns can prevent consumers from accessing the benefits of that marketplace and can hurt legitimate businesses by shrinking the market for their products and services. If the promise of the global marketplace is to be fully realized, governments must be able to assure the public that they are working to fight cross-border fraud.

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[3] Contempt of court is not generally an offense subject to extradition. *See* Restatement (Third) of the Foreign Relations Law of the United States § 475 cmt. c (1987); Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983; Extradition Treaty, Jun. 8, 1972, U.S.-U.K., 28 U.S.T. 227; Extradition Supplementary Treaty, Jun. 25, 1985, U.S.-U.K. T.I.A.S. No. 12050; Treaty on Extradition, May 14, 1974, U.S.-Austral., 27 U.S.T. 957; Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059; Treaty Concerning Extradition, Jun. 20, 1978, U.S.-Ger. (FRG), 32 U.S.T. 1485.

- Third, fighting cross-border fraud can help protect legitimate U.S. businesses from dishonest competitors.

- Finally, fighting cross-border fraud helps promote the idea of competition and free markets generally. A competitive market will thrive in direct proportion to consumers' ability to inform themselves about the relative merits of various purchasing alternatives and their ability to choose freely among those alternatives. Rooting out cross-border fraud can strengthen the ability of consumers to make informed choices based on truthful information, which will in turn promote free and fair competition.

Answers to Questions Submitted for the Record
Oversight Hearing on Antitrust Enforcement Agencies
Subcommittee on Antitrust, Competition,
and Business and Consumer Rights
Senate Committee on the Judiciary
September 19, 2002

Questions From Chairman Kohl

Question 1: **During the hearing we discussed the decline in the Antitrust Division's reported activity with respect to civil nonmerger cases. The statistics we received from the Antitrust Division showed a decline with respect to civil nonmerger activity as compared to the last administration, as follows. We compared fiscal year 2002 to date with the average annual data during the last four years for the Antitrust Division under Assistant Attorney General Klein (FY 1997-2000). The number of investigations initiated declined 28.4% in FY 2002 to date from its annual average from 1997-2000 (an annual average of 33.5 investigations in 1997-2000 to 24 in FY 2002). The number of civil nonmerger cases filed declined during this period as well. The number of civil nonmerger cases declined from an average of 7.25 during FY 1997-2000 to 4 in FY 2002 year to date, a 45% drop.**

(a) Mr. James, during the hearing you stated that the Antitrust Division was bringing civil nonmerger matters at the same pace as during your predecessor's administration. Could you please explain what you mean in light of the Antitrust Division's statistics described above? What is your explanation for the decline in civil nonmerger investigational and litigation activity by the Antitrust Division noted above?

Answer: Far from having been curtailed since my arrival, civil nonmerger enforcement efforts at the Division have been reinvigorated. When I arrived at the Antitrust Division in June 2001, I was determined to make civil nonmerger enforcement a priority, particularly in light of the fact that merger activity was down. The Division reorganization that I implemented was specifically designed to promote a revitalization of civil nonmerger enforcement, by giving each litigating section full responsibility for all civil enforcement activities in its industries and commodities. These efforts appear to have been successful. At the time I testified, we had already opened more civil nonmerger investigations in FY 2002 than in the previous fiscal year, and were on pace to meet or exceed the number opened in FY 1999.

(b) We also examined statistics from the Federal Trade Commission. FTC statistics show no decline in its enforcement activity, but rather a significant increase in nonmerger matters. For example, the number of nonmerger investigations pending for the first eleven months of FY 2002 was 117, while the average from FY 1996-2000 was 94, a 24% increase. The percentage of non-merger matters resulting in enforcement actions also increased in FY 2002 from the average during FY 1996-2000. Why did civil non-merger activity decline at the Antitrust Division while it was increasing at the FTC? Why was the Antitrust Division less active on civil nonmerger matters than the FTC during FY 2002 as compared to the preceding years?

Answer: Under the longstanding clearance agreement between the Division and the FTC, each agency has industries and commodities for which it generally takes enforcement responsibility. A civil nonmerger investigation is opened when the agency has reason to believe that the antitrust laws may have been violated. It is only natural and to be expected that there will be fluctuations from year to year in which industries possible antitrust violations occur that warrant further investigation. Any comparisons limited to a single year will not appropriately reflect this fact. In the last couple of years, for example, a large number of competitive issues have arisen pertaining to practices in the pharmaceutical industry, for which the FTC traditionally handles investigations. The Antitrust Division has been appropriately aggressive in pursuing civil nonmerger investigations where warranted.

Question 2: Mr. James, some competitive cable television companies -- the so-called "overbuilders" -- say that they have been victims of allegedly predatory conduct by the large, incumbent cable service providers. These include allegations of below-cost pricing by cable incumbents only in areas where overbuilders operate and targeted at customers that have switched from the incumbents to the competitive cable companies. During the hearing, you stated that an investigation was ongoing concerning one unnamed company in one geographic area. We have heard complaints concerning these practices from many different geographic areas and allegedly involving several different incumbent cable companies, and we understand that the overbuilders have brought these allegations to your staff as well. Do you have any plans to open a wider investigation into these allegations beyond the one to which you referred at the hearing? When can we expect a decision as to whether to open such an investigation? What criteria will you apply in deciding whether to open such an investigation?

Answer: The Division has received a number of complaints from overbuilders related to alleged predatory pricing by cable incumbents. We have requested additional information from several parties to enable us to more thoroughly review allegations of misconduct. In deciding whether to open an investigation, we also take into account information we have obtained from past investigations related to the cost of providing Multichannel Video Programming Distribution ("MVPD") services and the nature of competition in MVPD markets. The standard for opening an investigation is whether there is reason to believe an antitrust violation may have occurred. In evaluating these complaints we will be guided by the legal standard set forth in the case law -- whether the firm is pricing below an appropriate

measure of cost for the purpose of eliminating competition. With those considerations in mind, we will carefully examine the information provided to us, and if we conclude there is an antitrust violation we will take whatever enforcement action might be warranted.

Question 3. **By year's end it is very likely that the FCC will have deemed that local telephone competition exists in more than twenty states -- currently 20 states have been granted this "open to competition status." This means the local Bell incumbent can offer long distance in those states. The 1996 Telecom Act gave the Antitrust Division an important role in making this determination in what is known as the Section 271 process.**

(a) What will you do to ensure that these "approved" states will continue to be competitive? How closely will the Antitrust Division monitor telephone competition in the states that the FCC has deemed "open to competition"?

Answer: The Antitrust Division has played an important role in providing guidance to the FCC and the state regulatory agencies on the section 271 process, as well as in providing evaluations of section 271 applications to the FCC on the extent to which local markets are "open to competition." We intend to continue monitoring activities across the country. In states where the Bell Operating Company has been granted section 271 authority, the Division will continue to play its traditional roles of enforcing the antitrust laws and engaging in competition advocacy. This means that the Division will investigate and bring appropriate actions when market participants violate section 1 or 2 of the Sherman Act or when mergers are proposed. We will also look for and participate in FCC and state regulatory proceedings where we can provide competitive analysis that would assist these agencies in promoting and maintaining the development of local competition.

(b) What will you do if these local markets "backslide" into entrenched monopolies marked with anti-competitive behavior?

Answer: The Telecommunications Act of 1996 contains a savings clause that explicitly preserves the Division's authority to bring actions under the antitrust laws. The Division would therefore investigate and challenge the actions of an incumbent local provider if we concluded that it had engaged in anticompetitive conduct in violation of the antitrust laws. The 1996 Act also authorizes the FCC to take certain actions in the event of noncompliance with the market-opening provisions of the Act.

Question 4: **In the past few years, there have been numerous antitrust claims filed by private plaintiffs, both customers and competitors of the Bell Operating Companies, against the BOCs. Similarly, there have been popular press articles suggesting the BOCs are employing anticompetitive vertical restraints, such as tying, to restrict consumer choices of competitive telecom service providers. Are you concerned by these allegations? Has the Department conducted any of its own investigations into any of these or other allegations of**

anticompetitive behavior by incumbent local monopolies? Do you intend to do so in the future?

Answer: The Division is aware of the private suits and has filed amicus briefs in a number of them to attempt to ensure that courts do not improperly establish broad antitrust immunities that would shield anticompetitive conduct from challenge. The Division has also evaluated a number of complaints over the years related to BOC conduct and has opened investigations where warranted. To date the investigations have not resulted in any case. The Division will continue to monitor developments in this area, investigate complaints, and bring appropriate enforcement action when warranted.

Question 5: **Recently, FCC Chairman Michael Powell suggested to the Wall Street Journal that, due to the dire state of the telecommunications industry, mergers that were once "unthinkable" (a word used by then-FCC Chairman Reed Hundt to describe a rumored 1997 merger between AT&T and SBC) may now have to be considered. These may include mergers between Regional Bell Operating Companies (such as SBC or Verizon, for example) and long distance companies (such as WorldCom, for example). Such mergers, if indeed they are attempted, would seem to directly contradict the results of the break-up of AT&T accomplished twenty years ago, as well as settled telecommunications policy since that time. Please describe your approach towards possible mergers between local and long distance phone companies. Are there any circumstances in which you would find such mergers acceptable?**

Answer: As with mergers in other industries, the Antitrust Division would evaluate mergers between local and long distance phone companies in accordance with the approach set forth in our Merger Guidelines.

Merger analysis is a very fact-specific evaluation, and would depend in any instance on specific details about the deal itself, the participants, the nature and extent of competition in the affected markets, entry conditions, and potential efficiencies that the parties can demonstrate. Given the significant evolution in telecommunications markets over the last 20 years, it would also be necessary to take into account technological, regulatory, and other significant changes. Beyond that, it would be inappropriate for me to speculate as to how the Division might react to a hypothetical transaction.

Question 6: **The Federal Trade Commission recently held a health care workshop which devoted a good deal of attention to the conduct of doctors and hospitals but comparatively little to the conduct of health plans and health insurers. Does the Justice Department plan to devote resources to health plan oversight in an amount that is roughly comparable to the amount the FTC plans to devote to doctors and hospitals?**

Answer: The Department certainly intends to devote resources to health plan oversight in comparable fashion, and is already doing so. Among the primary responsibilities of the Division's recently formed Litigation I Section are the healthcare industry and the insurance industry generally, including health plans and health insurers. Many of the section's attorneys come from the former Health Care Task Force and have extensive experience related to health insurers. The Division also has a number of economists with expertise and direct experience relevant to analyzing markets for health plans and health insurance, who work with Litigation I in overseeing the activities of this sector. In conjunction with our other efforts, on November 7 the Division announced that it would host hearings with the FTC on a full range of health care competition law and policy issues, beginning in February.

Question 7: In the last few years, we have observed a growing number of seller joint ventures (known as "B2B" or "B2C" ventures) in diverse businesses such as online travel, music, movies, currency exchange, bond trading, and automotive supplies. Press reports indicate that the Antitrust Division is in fact currently investigating the primary seller-owned ventures in several of these industries.

(a) Tell us about your approach towards analyzing these B2B and B2C ventures, and whether there are commonalities in the manner in which you are conducting your review across these industries.

Answer: Joint ventures are a high enforcement priority for the Antitrust Division, in part because we believe that many firms are turning to joint ventures as an alternative to mergers, and in part because joint ventures are an important way in which firms interact with each other in emerging markets. The Division investigates a supplier-owned joint venture by analyzing its impact on competition in the relevant markets. While there are variations depending on the specific facts involved, generally our focus is on whether the joint venture increases the ability and incentive of the joint venture participants to raise price above -- or to reduce output, quality, service, or innovation below -- what likely would prevail in the absence of the joint venture. Typically, the Division begins by assessing whether there is a sufficient level of economic integration among the parties to justify characterizing the collaboration as a joint venture. If so, then the Division identifies and defines the relevant markets in which the joint venture might produce anticompetitive effects, and then examines the impact of the joint venture's restrictions on competition in those markets. If the Division finds that the joint venture's structure or restrictions are likely to produce significant anticompetitive effects, then the Division examines whether those anticompetitive effects are likely to be outweighed by welfare-enhancing efficiencies and, if so, whether the restrictions are reasonably necessary to achieve those efficiencies.

In those instances where a supplier-owned joint venture does not involve significant economic integration by the parties, and is simply a blatant restraint of trade, such as a *de facto* price-fixing or output restriction agreement, the Division challenges the joint venture as *per se* illegal.

(b) Do "most-favored-nation" clauses and exclusivity incentives sometimes found in these ventures raise competition concerns?

Answer: Most-favored-nation ("MFN") clauses can raise specific competitive concerns in the Division's analysis of supplier-owned joint ventures. The competitive issues most frequently generated by MFN clauses are whether the MFN clause: (1) serves as a mechanism to reduce horizontal competition between the joint venture supplier participants; (2) reduces incentives for the joint venture supplier participants to do business with competitors of the joint venture; or (3) reduces incentives for the joint venture's independent competitors to enter into relationships with the joint venture's supplier participants because the competitors know that the participants are required to offer the same terms to the joint venture.

Whether a MFN clause in a supplier-owned joint venture agreement undermines the ability of an independent website to compete depends on multiple case-specific factors, including, but not limited to: (1) the specific content and operation of the MFN clause; (2) the type of products or services provided by the joint venture; (3) the impact of the MFN clause on barriers to entry in the relevant market; (4) whether the MFN clause produces efficiencies, and the nature of those efficiencies; (5) the market shares and market positions of the joint venture participants; and (6) the structure of the relevant markets.

Question 8: **We have heard allegations of predatory pricing in the airline industry, particulary since America West removed the Saturday stay-over requirement to be eligible for discounted fares. These allegations include charges that the large airlines have cut fares by as much as 80% and have greatly added to seat capacity on routes that compete with America West. Are you concerned about these allegations? What are your plans to investigate these and other allegations of predatory pricing in the airline industry?**

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): The Antitrust Division monitors the airline industry closely for possible anticompetitive agreements or conduct, including potential predatory and exclusionary practices. We are aware of concerns that have been expressed about the pricing and availability responses of some of the major airlines to the new fare structure introduced by America West in March 2002. As demonstrated by the Division's lawsuit, now on appeal, against American Airlines for predatory capacity additions at Dallas-Fort Worth International Airport, we will take appropriate enforcement action against such behavior when warranted.

Question 9: **Some have raised the question as to whether the government's civil remedies in antitrust cases are adequate. As we saw in the Microsoft settlement, the only remedy available to the government in a civil antitrust proceeding is a consent decree in which the antitrust violator pledges to cease its antitrust violation and commits not to engage in illegal activity in the future. There is no requirement theat the company disgorge any profits**

it obtained as a result of its illegal conduct, nor are civil fines imposed. Mr. James, do you believe that the government's civil remedies are adequate in antitrust cases? Wouldn't it be desirable to give the government the ability to obtain disgorgement of illegally obtained gains, or to impose fines when it prevails in civil antitrust cases?

Answer: I believe the civil remedies available to the government in antitrust enforcement actions, together with the treble damages available to private parties injured in their business or property, are adequate to the task.

Question 10: We have heard from several practitioners that there is a recent trend in plaintiffs' discovery requests to include a blanket request for all documents produced by the defendant company in response to a Justice Department Antitrust Division civil investigative demand ("CID"). These practitioners have said that it has made them question how open and cooperative they should be when responding to CIDs from the Division. Are you aware of any such trend and have you encountered any resistance to CIDs as a result of it?

Answer: The Division has been aware of this practice for some time, but is unaware of either a recent increase in the use of it or a decrease in cooperation from CID recipients as a result of it. The Division is committed to ensuring compliance with CIDs, and will go to court if necessary to enforce compliance.

Question 11: Mr. James, will the elimination of the Health Care Task Force have any impact on the Division's monitoring and enforcement of compliance with existing consent decrees in the health care industry? Who will be responsible for monitoring compliance with health care consent decrees in the Division?

Answer: The elimination of the Health Care Task Force was part of a reorganization within the Division that transferred responsibility for health care matters to a new Litigation I Section. In addition to bringing new investigations and enforcement actions related to health care, the Litigation I Section will be responsible for enforcing existing consent decrees in this area.

Question 12: Mr. James, your deputy Deborah Majoras gave a speech at the recent FTC health care workshop in which she stated that the Antitrust Division "will pay close attention" to mergers among health insurers or health care plans. She further stated that the Division would examine whether such mergers would give the insurer sufficient market power to increase prices or reduce quality in the sale of managed care or to acquire monopsony power over providers. Ensuring competitive health care markets is also a priority for us on the Antitrust Subcommittee. Please describe in greater detail the Division's plans to examine mergers among health insurers, and whether there are any specific practices of health

insurers or market conditions which are of particular concern to the Antitrust Division. In addition, how does the McCarran-Ferguson Act impact your efforts to scrutinize anticompetitive behavior in the health insurance market?

Answer: The Antitrust Division will continue to carefully review mergers in the health care sector as they are proposed, focusing on whether any merger would give the merged insurer sufficient market power to increase prices or reduce quality in managed care plans in specific geographic areas, or would give the merged insurer monopsony power over providers.

In addition to merger enforcement, the Division will also continue to examine conduct among health plans and health insurers that raises competitive concerns.

The hearings we announced November 7 on health care competition law and policy will focus on a variety of issues that will be useful to our enforcement efforts in both the merger and civil nonmerger areas. Topics expected to be covered include issues such as hospital mergers, the significance of hospitals' non-profit status, vertical arrangements, quality and efficiency, the Noerr-Pennington and state action doctrines, and the adequacy of existing remedies for anticompetitive conduct. Specifically with regard to health plans, the Division and the FTC will seek information on such topics as whether consolidation in this sector is likely to give rise to market power, whether plans coordinate either tacitly or explicitly in ways that raise antitrust concerns, the costs and impediments to entry into these markets, and the conditions under which plans might obtain and exercise monopsony power against providers. We expect to receive valuable input from relevant medical, insurance, legal, academic, and government groups through these hearings, and to ultimately prepare a public report based on the presentations made and submissions received.

The limits placed on our scrutiny of health insurer practices by the McCarran-Ferguson Act would depend on the particular circumstances. That Act's antitrust exemption applies to "the business of insurance," which the Supreme Court has interpreted to involve the risk-spreading function that insurers provide to their policyholders. Dealings between insurers and providers have been held to fall outside the business of insurance. Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979). Accordingly, the applicability of McCarran-Ferguson to any agreement or joint conduct among insurers will depend in large part on the extent to which it involves "the business of insurance." Even if the agreement or joint conduct does involve the business of insurance, the exemption does not apply to acts of boycott, coercion, or intimidation, and does not apply to the extent that the business of insurance is not regulated by state law.

Questions From Senator DeWine

Question 1: Joint Ventures

In your testimony, you indicated that antitrust enforcement in the area of joint ventures is a high priority for the Antitrust Division. In a letter sent to the Antitrust Division and to the FTC in early 2001, Senator Kohl and I expressed concern with a particular type of joint venture -- supplier-owned joint venture websites.

(a) The Antitrust Division has several open investigations of supplier-owned joint ventures. Please explain the Antitrust Division's investigative approach to examining these types of joint ventures.

Answer: Joint ventures are a high enforcement priority for the Antitrust Division, in part because we believe that many firms are turning to joint ventures as an alternative to mergers, and in part because joint ventures are an important way in which firms interact with each other in emerging markets. The Antitrust Division investigates a supplier-owned joint venture by analyzing its impact on competition in the relevant markets. Generally, our focus is on whether the joint venture increases the ability and incentive of the joint venture participants to raise price above, or to reduce output, quality, service, or innovation below, what likely would prevail in the absence of the joint venture. Typically, the Division begins by assessing whether there is a sufficient level of economic integration among the parties to justify characterizing the collaboration as a joint venture. If so, then the Division identifies and defines the relevant markets in which the joint venture might produce anticompetitive effects, and then examines the impact of the joint venture's restrictions on competition in those markets. If the Division finds that the joint venture's structure or restrictions are likely to produce significant anticompetitive effects, then the Division examines whether those anticompetitive effects are likely to be outweighed by welfare-enhancing efficiencies and, if so, whether the restrictions are reasonably necessary to achieve those efficiencies.

In those instances where a supplier-owned joint venture does not involve significant economic integration by the parties, and is simply a blatant restraint of trade, such as a *de facto* price-fixing or output restriction agreement, the Division challenges the joint venture as *per se* illegal.

(b) What are the key competitive issues raised by supplier-owned joint ventures?

Answer: Because of the numerous types of supplier-owned joint ventures, they can potentially raise a wide variety of competitive issues. Two core issues that are often present are whether the joint venture: (1) is likely to reduce horizontal competition among the joint venture participants; or (2) represents an attempt to control the product or service markets in which the joint venture competes, by limiting the ability of non-participants to compete in those markets.

(c) Does the Antitrust Division employ the same approach to examining supplier-owned joint ventures across different industries? How, if at all, do the different market conditions in each industry in which supplier-owned joint ventures operate impact the Antitrust Division's analyses?

Answer: The Division applies the same substantive standards regardless of the industry involved; and the approach is always similar in that the Division is analyzing the joint venture's impact on competition. However, the specific nature of the product or service markets at issue, as well as the nature of the joint venture, affects the type of information the Division needs to obtain, and the issues the Division needs to resolve, in order to determine that impact.

(d) Several supplier-owned joint ventures allegedly employ most-favored-nation ("MFN") contract clauses. Do MFN clauses raise specific competitive concerns in the Antitrust Division's analyses of supplier-owned joint ventures? If MFN clauses raise specific competitive concerns, please outline the concerns. Generally, do MFN clauses impact the ability of independent websites to compete with supplier-owned joint ventures? In those industries where contracts creating supplier-owned joint ventures contain MFN clauses, have independent competitors been able to compete effectively against the joint ventures? Should the Antitrust Division, either alone or in conjunction with the FTC, comprehensively review the potential competitive benefits and potential competitive harms of MFN clauses in contracts that form supplier-owned joint ventures in order to provide guidance to firms before they include such terms in their joint venture contracts? Does the Antitrust Division currently have enough experience and data from its past and ongoing investigations of these supplier-owned joint ventures to conduct such a review?

Answer: Most-favored-nation ("MFN") clauses can raise specific competitive concerns in the Division's analysis of supplier-owned joint ventures. The competitive issues most frequently raised by MFN clauses are whether the MFN clause: (1) serves as a mechanism to reduce horizontal competition between the joint venture supplier participants; (2) reduces incentives for the joint venture supplier participants to do business with competitors of the joint venture; or (3) reduces incentives for the joint venture's independent competitors to enter into relationships with the joint venture's supplier participants because the competitors know that the participants are required to offer the same terms to the joint venture. While MFN clauses do not produce the same general competitive effects in all markets, this question is an important focus of our analysis.

Whether a MFN clause in a supplier-owned joint venture agreement undermines the ability of an independent website to compete depends on multiple case-specific factors, including, but not limited to: (1) the specific content and operation of the MFN clause; (2) the type of products or services provided by the joint venture; (3) the impact of the MFN clause on barriers to entry in the relevant market; (4) whether the MFN clause produces efficiencies, and the nature of those efficiencies; (5) the

market shares and market positions of the joint venture participants; and (6) the structure of the relevant markets.

Question 2: Civil Nonmerger Enforcement

Civil nonmerger antitrust enforcement should represent an important enforcement priority for the Antitrust Division. At the hearing, you testified that during your tenure the Antitrust Division has reduced the amount of time it keeps civil nonmerger investigations open. Antitrust Division statistics confirm that the Antitrust Division has reduced the length of civil nonmerger investigations during your tenure.

(a) Civil nonmerger matters require rigorous, careful analysis. Civil nonmerger investigations, however, are not governed by statutory timelines. What steps has the Antitrust Division taken to ensure that it investigates civil nonmerger matters thoroughly while also concluding the investigations within reasonable time periods?

Answer: The reorganization of the Division more fully along industry and commodity lines is designed to promote "community policing," which will strengthen each attorney's or economist's focus and accumulated expertise within his or her industry and commodity area of responsibility. Among other things, this promotes more thorough and efficient conducting of investigations. The Division is also placing greater emphasis on beginning the legal and economic analysis at the outset of an investigation, with progress reports at regular intervals to ensure that an investigation is moving forward appropriately or, if not, to consider whether it should be closed. In addition, the Division is placing greater emphasis, where the parties being investigated are willing, on conducting discovery requests in a more cooperative and expedited fashion.

(b) List and explain generally the factors that commonly impact the length of civil nonmerger investigations.

Answer: The most common factors are the complexity of the legal and economic issues involved, the number of parties, other participants in the markets involved, and the level of cooperation from the parties with respect to discovery requests, along with Division workload and resources considerations.

(c) In civil nonmerger matters, unlike mergers, parties are free to proceed with transactions and conduct, without notification or preclearance requirements. How does the lack of such requirements impact the time needed to conduct thorough civil nonmerger investigations?

Answer: The lack of a specific requirement that the parties provide us with the information we need to conduct an appropriate evaluation before they can proceed with their activity means that they

may lack incentives to comply as promptly with our discovery requests as would merging parties under the Hart-Scott-Rodino Act. At the same time, because the competitive concern involves conduct that is actually taking place and may be already causing competitive harm, the Antitrust Division has an especially strong incentive to pursue our investigation as quickly as we can. The Antitrust Civil Process Act gives us the means to enforce prompt compliance with our discovery requests.

Question 3: **Airline Codesharing Alliances**

Recently, several airlines have announced two significant codesharing alliances. The Antitrust Division often reviews proposed codesharing alliances.

(a) Outline the analytical framework that the Antitrust Division employs when it examines codesharing alliances between airlines.

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): Airline codesharing alliances are essentially joint ventures between airlines, in which each carrier is able to sell seats on flights operated by its alliance partners. Such alliances often include certain joint marketing and operational activities, such as reciprocal frequent flyer and airport lounge programs, coordinated scheduling to facilitate smooth connections, and efforts to coordinate travel logistics such as check-in and gate locations.

Codesharing alliances can have significant procompetitive as well as significant anticompetitive effects. On the procompetitive side, alliance partners may offer new online service, improved connections, greater flight frequency, expanded networks, and increased competition in many markets. On the anticompetitive side, alliances can result in capacity reductions, higher fares, or foreclosure of rivals from markets.

The antitrust investigation of a codesharing alliance involves a case-by-case analysis of the specific terms of the agreement to assess its effect on competition. An important step is to identify markets where the codesharing partners are actual or potential competitors. Generally, the greatest threat to competition occurs in markets where two or more of the proposed alliance partners compete with each other and where there are few other actual or potential competitors. In contrast, when a proposed codeshare links a city-pair market served by one partner with a city-pair market served by the other, the alliance would create what is referred to as an "end-to-end efficiency," which is generally procompetitive. In practice, most alliances involve carriers with overlap in some markets, but with potential end-to-end efficiencies in others.

Once we have identified markets where the carriers compete with each other, the Division considers whether the agreement is structured in such a way that the partners' entry, capacity, and pricing decisions will remain independent -- that is, whether it is structured in a way that preserves for each carrier the strongest possible incentive to enter new markets even if already served by its partner,

to sell seats on the flights it operates rather than on those of its codeshare partner, and to cut its prices and improve its service to gain market share against its partner. Similarly, we consider whether the agreement preserves the carriers' incentives to set the terms of their respective frequent flyer programs competitively, and to offer competitive discounts to corporate customers.

If a proposed alliance is likely to have anticompetitive effects in some markets, but efficiencies in others, we may seek to modify the alliance so as to mitigate the competitive harms while preserving the benefits. For example, we will often request that the carriers agree not to offer codeshare service to local passengers in domestic city-pair markets where they each offer nonstop service. That is, we will "carve out" these nonstop overlap markets. This carve-out approach is intended to permit airline passengers to obtain the benefits of increased efficiency and improved service, while avoiding possible diminutions in service or increased air fares on overlap routes.

The Antitrust Division has analyzed airline alliances in both the international and the domestic marketplace. In most respects, our analytical approach is the same whether the airline alliance is domestic or international, although there are two important differences. First, for domestic alliances, there are generally more markets where the carriers are actual or potential competitors with one another. In contrast, for many international alliances, laws and treaties may preclude U.S. carriers and their foreign alliance partners from competing broadly against one another, so that an international code-share agreement may be the only way in which a U.S. carrier can gain online access to foreign markets. Second, with international alliances, DOT has authority to grant antitrust immunity; DOT has no such authority for domestic alliances, so the alliance partners continue to be subject to antitrust scrutiny.

(b) Airlines forming codesharing alliances must submit details of the alliances to the Department of Transportation at least 30 days before the alliances take effect. The Department of Transportation may extend further the time before the codesharing alliances take effect by 150 days. Generally, is the initial 30 day time period a sufficient amount of time for the Antitrust Division to analyze properly the competitive impact of codesharing alliances?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): The amount of time necessary for the Antitrust Division properly to analyze the competitive impact of a proposed codesharing alliance will depend on the specifics of the proposed agreement. While the initial 30 day period does not always provide enough time for this analysis, it has been our experience thus far that carriers are unwilling to risk implementing their alliances prior to the completion of our review. In addition, DOT has delayed the effective date when necessary in order for it to complete its own review.

(i) Do airlines face substantial difficulties in disentangling codesharing alliances? Explain any substantial difficulties airlines may face in disentangling codesharing alliances.

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): The difficulties involved in disentangling a codesharing alliance will depend on the particular circumstances and attributes of the alliance. One important difference from a merger is that the alliance partners remain independent entities, who may coordinate certain operations such as baggage handling, but will not fully integrate them. As a result, if the Antitrust Division determined that an alliance had anticompetitive consequences that constituted a violation of the antitrust laws, there would ordinarily be less difficulty in disentangling it than in separating merged entities. On the other hand, reversing changes that the carriers may have made in pursuit of the alliance -- such as entering routes that would not be profitable without the alliance, or altering schedules to accommodate connections with the alliance partner -- could potentially impose some costs on the carriers.

(c) Does the Antitrust Division consider the financial state of the airline industry in its analyses of codesharing alliances? Should the Antitrust Division do so?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): The Division's objective in analyzing codeshare alliances is to ensure that these agreements do not deprive consumers of the benefits of competition. To the extent that the financial condition of an airline may have implications for the effect of an alliance on competition, we would take such considerations into account. In particular, if one of the alliance partners is a financially failing airline that would otherwise withdraw assets from the market, such an alliance may be more likely to promote competition than to diminish it.

(d) What has the Antitrust Division's experience analyzing codesharing alliances and competition in the airline industry shown about the effect of codesharing alliances on:

(i) competition between alliance members?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): As noted previously, when our analysis of a proposed alliance has indicated that it would adversely affect competition in specific city-pair markets, we have sought to remove those markets from the scope of the agreements. To the extent that we have looked at routes where a codesharing alliance was already in effect, we have not found evidence of anticompetitive effects from the alliance. In some instances, we have found evidence that average fares on codeshared routes have tended to fall, and traffic levels have tended to rise, suggesting that codesharing has promoted competition in some markets.

(ii) entry of new competitors in areas served by the codesharing alliances?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): We believe that the potential for codesharing to create entry barriers is an important consideration in reviewing proposed alliances, and we continue to monitor existing alliances for evidence of such effects. We are aware of occasions when a non-alliance carrier has exited a route served by a codesharing alliance, as well as occasions when a non-alliance carrier has entered such a route.

(iii) services, routes, and schedules offered by alliance members?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): When we have looked at routes where a codesharing alliance was in effect, we have generally found evidence that the overall level of service offered by alliance members, as measured by available seat capacity and flight frequency, had increased. These increases in traffic on routes where codesharing had become available also suggested related improvements in the quality of service, such as smoother connections in hub airports and shorter layovers.

Question 4: Multichannel Video Programming Distribution

Competition in the multichannel video programming distribution ("MVPD") market impacts the rates, quality, and choices that consumers have when purchasing video programming. In the last year, the Antitrust Subcommittee has held hearings on two proposed mergers that may impact the MVPD market -- the EchoStar/DirectTV merger and the AT&T/Comcast merger. In addition, there have been some allegations of anticompetitive conduct by some cable system operators that dominate in the areas that they serve (also known as cable incumbents).

(a) Cable rates have been rising in excess of the rate of inflation for several years. Cable firms often claim that rising programming costs have led to the rising cable rates. Based on the Antitrust Division's antitrust enforcement experience in the MVPD market, has the Antitrust Division found evidence that rising programming costs have driven rising cable rates?

(i) Has the Antitrust Division found that consolidation in the cable industry impacted the increases in cable rates?

(ii) Explain any link that the Antitrust Division has found between cable consolidation and cable rate increases.

Answer: As a law enforcement agency, the Antitrust Division investigates specific transactions and conduct. The Division does not conduct general studies of the cable industry or cable rate increases. Most of the Division's investigations of cable mergers have involved combinations of companies that did not provide video programming services in the same geographic area. These investigations have primarily focused on vertical issues stemming from the cable systems' ownership of programming or joint ownership of cable Internet service providers, and did not involve the question of whether the elimination of a direct competitor would increase prices for consumers.

We have looked at the impact of combinations between cable companies and DBS providers in the Primestar matter. In that matter, we concluded that the elimination of competition between these entities who competed directly for customers would lead to higher prices. The deal was abandoned after we filed suit. We have also now filed suit to challenge the proposed merger between Echostar and DirecTV, to prevent the consolidation of the assets of the only two significant direct broadcast satellite licensees in the United States.

(b) Some cable systems operators have claimed that consolidation in the cable industry would allow greater clustering of cable systems. According to cable firms, clustering would, in turn, lead to reduced costs. Has the Antitrust Division found that clustering reduces cable systems' costs? Has clustering affected cable rates? Explain any link the Antitrust Division has found between cable consolidation and cable rates.

Answer: In keeping with its role as a law enforcement agency, the Division has not conducted general studies on the effect of clustering on cable rates. Clustering could allow cable firms to achieve efficiencies if it enabled the firms to consolidate facilities. Such a merger may allow for more customers to be served off a single headend, as well as enabling more efficient repair and maintenance and a more efficient rollout of new services, such as high-speed Internet access and telephony. In some cases, having a sufficient number of potential customers in a single geographic area can be an important consideration in a cable company's economic calculus as to whether to invest to upgrade its facilities in that area.

While some industry participants have suggested that an FCC study supports the conclusion that clustering leads to higher prices, the FCC has declined to draw this inference. The FCC has done a number of variations of this study, and a possible relationship between clusters and price only shows up occasionally, and may in those instances be a product of bad data. Even if it were shown that clustered systems are likely to have higher prices, we would have to rule out the possibility that the higher prices reflect consumers' willingness to accept higher prices for what they regard as higher-quality service in clustered markets. For example, service calls might be answered more efficiently when service trucks can operate over a large cluster. In general, the Division does not have reason to believe that a cable company that expands its geographic area by a merger that does not eliminate a horizontal competitor would be likely to thereby lessen competition for cable customers.

(c) What impact, if any, has cable consolidation had on the market for providing video programming?

Answer: In keeping with its role as a law enforcement agency, the Division has not conducted general studies regarding the impact of large multiple systems operators ("MSOs") on the market for the provision of programming. In connection with its investigations of the AT&T/MediaOne merger and other cable mergers, however, the Division has looked at the issue of whether the creation of a larger MSO was likely to create a firm with monopsony power. Programming markets are national, and the same programming is sold to cable, DBS, and other MVPD providers. In AT&T/MediaOne, we concluded that the combined market share of these two companies (approximately 16% of the MVPD subscribers nationwide) was not sufficient to raise concerns that the merged firm would be able to exercise monopsony power.

(d) The Antitrust Subcommittee has received numerous complaints of predatory pricing by cable incumbents against so-called cable overbuilders. The Antitrust Division has received some of these complaints as well.

(i) What standard does the Antitrust Division apply to determine whether to launch predatory pricing investigations in the cable industry?

Answer: The Division has received a number of complaints from overbuilders related to alleged predatory pricing by cable incumbents. We have requested additional information from several parties to enable us to more thoroughly review allegations of misconduct. In deciding whether to open an investigation, we will also take into account information we have obtained from past investigations related to the cost of providing MVPD services and the nature of competition in MVPD markets. The standard for opening an investigation is whether there is reason to believe an antitrust violation may have occurred. In evaluating these complaints we will be guided by the legal standard set forth in the case law -- whether the firm is pricing below an appropriate measure of cost for the purpose of eliminating competition. With those considerations in mind, we will carefully examine the information provided to us, and if we conclude there is an antitrust violation we will take whatever enforcement action might be warranted.

(ii) How do allegations, if true, that cable overbuilders only enter the most economically attractive neighborhoods served by cable incumbents when they enter markets affect the analysis of whether to launch predatory pricing investigations of cable incumbents?

Answer: Our analytical approach would be the same regardless of the nature of the areas that the overbuilders choose to enter.

Question 5: Telephone Competition

The Telecommunications Act of 1996 granted a role to the Antitrust Division in examining applications of Bell Operating Companies to provide long distance services in their local service areas ("section 271 applications"). One specific role the Antitrust Division occupies is evaluating the existence of local phone competition in the local areas of Bell Operating Companies that seek to provide long distance services in those areas.

(a) What is the Antitrust Division's overall assessment of the state of local telephone competition?

Answer: While the speed at and extent to which local competition has developed has proven to be less thus far than what some anticipated at the time of the passage of the Telecom Act, progress has been made in opening markets. Publicly available data from the FCC indicates that new local exchange competitors held approximately 10% of lines nationwide at the end of 2001, and growth has continued in 2002. Competition has developed more extensively in serving business customers, where U.S. competitors had a share of more than 20% of lines at the end of 2001. Residential shares are lower, at 6% of lines. Cable companies are just starting to provide telephony and have a very small share of residential lines.

(b) Has the Antitrust Division found a need to undertake any steps to ensure continued local phone competition in the local service areas of Bell Operating Companies once their section 271 applications have been approved? Describe any steps that the Antitrust Division has undertaken.

Answer: While the Telecommunications Act gives the FCC primary responsibility for enforcing the market-opening provision of the Act, it also contains a savings clause that expressly preserves the Division's authority to bring actions under the antitrust laws. Accordingly, in states where the BOC has been granted section 271 authority, the Division will continue to investigate as appropriate, and to bring appropriate enforcement actions when we conclude that the BOC or other market participants have engaged in anticompetitive conduct in violation of section 1 or 2 of the Sherman Act, or when mergers are proposed that raise potential competitive concerns. In addition, in our role of competition advocacy, we will participate in FCC and state regulatory proceedings where we can provide competitive analysis that would assist these agencies in promoting and maintaining the development of local competition.

Question 6. Judgment Enforcement

As you noted in your testimony, more and more cases are resolved by consent decrees. You indicated that the Antitrust Division needed to examine the entire remedy process and that it is now undertaking such a review.

(a) Describe the review that the Antitrust Division is currently undertaking.

Answer: The Antitrust Division is reviewing its policies and practices with respect to the remedies in merger and civil conduct cases, in order to provide Division attorneys and economists with a detailed legal and economic framework for fashioning appropriate remedies in both the litigation and consent decree context. The review is focusing on the various remedies available to the Division, what legal limitations are applicable to any particular remedy, what policy issues may arise in connection with the different types of relief, and how these issues can be effectively and expeditiously resolved to develop remedies based on sound legal and economic principles and closely related to the identified competitive harm.

(b) Does the Antitrust Division's review include a review of how the Antitrust Division monitors parties' compliance with consent decrees?

Answer: One of the important guiding principles to come out of this review is likely to be the importance of devoting sufficient resources to ensure compliance with our decrees. While this review is not intended to focus on compliance with specific decrees, the remedies project is likely to address the need for clear and enforceable decrees to ensure that we will have ready recourse to successful contempt proceedings in the event of noncompliance.

Separately, the Division has been taking steps to ensure that each consent decree is assigned to specific attorneys who will monitor compliance with it. We consider this an important part of carrying out our enforcement responsibilities.

(c) Does the Antitrust Division have a comprehensive scheme in place to monitor judgments and parties' compliance with the consent decrees? If the Antitrust Division has a comprehensive scheme to monitor judgments and decrees, describe the scheme. If the Antitrust Division does not have a comprehensive scheme in place to monitor compliance with its judgments and consent decrees, explain whether such a comprehensive scheme is necessary, whether such a scheme would benefit antitrust enforcement, and the potential cost of such a scheme. Absent any type of comprehensive monitoring of compliance with consent decrees, how does the Antitrust Division gather information to assess whether violations of consent decrees have occurred? Does the Antitrust Division have a scheme in place to determine whether consent decrees that are currently in force are still useful and necessary? Describe the scheme.

Answer: Under the current organization of the Antitrust Division, each industry has been allocated to one of the six civil sections within the Division according to the code assigned the industry under the North American Industry Classification System ("NAICS"). Each of those civil sections is responsible for investigating possible violations of the antitrust laws that may have occurred within the

industries assigned to it. In conjunction with that responsibility, specific attorneys in each section are responsible for monitoring and enforcing each consent decree that relates to an industry within that section's purview.

The monitoring and enforcement of consent decrees described in our response to your question 6(c), above, also includes consideration of whether the consent decree is still useful and necessary or should be modified or sunset. The Division also encourages parties who believe a current decree is having an anticompetitive effect to bring that concern to the Division's attention.

The Division has an active program to ensure compliance with its decrees. Within the past five years, the Division has filed four contempt petitions to enforce compliance with its decrees: *United States v. Microsoft* (D.D.C. 1997), *United States v. Interstate Bakeries Corp. & Continental Baking Co.* (N.D. Ill. 1999), *United States v. Smith Int'l & Schlumberger Ltd.* (D.D.C. 1999), and *United States v. Earthgrains Baking Cos.* (N.D. Ill. 2002).

Question 7. Impact of the HSR Improvements Act on Antitrust Enforcement

Congress reformed the Hart-Scott-Rodino Act in 2000.

(a) Describe the effects of the reforms on the Antitrust Division's merger review and enforcement efforts.

Answer: Except as noted in the response to your question 7(b), below, the increase in the dollar thresholds for premerger reporting has not appreciably affected the Division's merger enforcement. The mergers for which we are conducting extensive investigations now are the same ones we would have been investigating under the old thresholds. The principal effect of the increase in the thresholds has been the intended effect of reducing the burden on the business community by eliminating the reporting requirement for a large number of mergers that were subject to it under the old thresholds.

(b) Have the reforms impacted how the Antitrust Division allocates resources to merger reviews?

Answer: No, except for the time that used to be spent giving a preliminary review to the mergers reported under the old thresholds that would not be reportable under the new thresholds. As was understood at the time the reforms were enacted, relatively few of those smaller mergers ended up being given more extensive review for possible challenge. Thus, the mergers that required commitment of significant resources under the old thresholds continue to require commitment of extensive resources under the new thresholds.

(c) Describe any efforts the Antitrust Division undertakes or has undertaken to identify transactions that fall beneath the threshold for reporting under the Hart-Scott-Rodino Act, yet still raise anticompetitive concerns. Describe the results of any such efforts.

Answer: Attorneys and economists at the Division are constantly on the lookout for competitively significant developments in the industrial sectors and commodities they are responsible for. The recent reorganization of the Division is designed to further promote this "community policing." As was the case before the new thresholds took effect, mergers with significant anticompetitive potential come to our attention through a variety of avenues, including not only HSR filings but also trade press reports, as well as complaints from competitors, suppliers, or customers. Since the new thresholds became effective February 1, 2001, the Division has opened more than 40 merger investigations for which the merger was not subject to HSR reporting under the new thresholds.

Question 8: The Role of Antitrust Enforcement in Ensuring a Competitive Marketplace of Ideas

Ensuring an open and competitive marketplace of ideas, especially in the face of ever-growing media consolidation, remains an important goal. At the hearing, you testified about the limits of the Antitrust Division and the FTC in attempting to ensure a competitive marketplace of ideas. Please explain what role, if any, you believe the Antitrust Division, the FTC, and traditional antitrust enforcement can play to ensure that numerous, diverse, independent media sources continue to exist and that a vibrant marketplace of ideas exists.

Answer: Antitrust analysis focuses on competition in the economic sense, and the preservation of healthy incentives to compete, and the courts will insist that we confine our enforcement efforts to provable antitrust violations. When viewers pay directly for the media service they are receiving, the focus is on competition for viewers. When advertisers are underwriting the cost of the media service, the focus is on competition for advertisers. An anticompetitive restraint of trade among media outlets, or an attempt by a media outlet to monopolize a market, or a merger that substantially lessened economic competition in a media market, would certainly also tend to impair the quality and variety of media choices available to viewers. For this reason, vigorous antitrust enforcement in the media marketplace also furthers our nation's interest in having a diversity of voices. Media consolidation can both lessen competition and diminish the diversity of voices. While the two interests are related, however, they are distinct. Our nation's interest in diversity of voices may justifiably go beyond what is necessary to ensure competitive economic choice. That further interest is appropriately addressed through avenues other than the antitrust laws.

Question 9. Intellectual Property Hearings

Please provide more information regarding the nature, scope, and goals of the Intellectual Property hearings the Antitrust Division recently conducted with the FTC. What next steps does the Antitrust Division anticipate resulting from the intellectual property hearings?

Answer: The Antitrust Division joined the FTC in holding these hearings because, as the creation and dissemination of intellectual property has become increasingly important for economic growth and consumer satisfaction, more of the Division's investigations involve the acquisition or licensing of intellectual property. The hearings are seeking information and insights to help us ensure that, as we analyze how antitrust law addresses the competitive implications of conduct involving intellectual property, we take appropriate care to maintain proper incentives for the innovation and creativity on which our national economy depends.

Our hearings have sought input from business people, academics, and practitioners representing a wide range of views on topics central to the debate about antitrust and intellectual property law and policy. The Division has taken the lead in the portion of the hearings focusing on competitive concerns related to the licensing of intellectual property. Thus far, we have examined a number of issues in detail, including: patent pools and cross-licensing; standard setting; refusals to license intellectual property; IP bundling and the extension of IP rights; agency analysis of ambiguous IP rights; and an international comparative law perspective on refusals to license and bi-lateral/multiparty licensing.

More than 35 sessions of the hearings have been held since the first session on February 6, 2002. The agencies have now begun drafting a joint report which will reflect, synthesize, and analyze the views presented to the agencies by the myriad participants as well as those submitted through written comments to the hearing record. The agencies expect to complete this report within the next year.

Questions from Senator Feinstein

Question 1: **Archer Daniels Midland is a firm that has a history of price fixing, some of its executives have served jail time for corporate abuses, and the Justice Department is conducting an investigation into ethanol bid rigging by ADM. Mr. James, would you agree that ADM deserves special scrutiny by the Justice Department because of these factors -- on top of the fact that a combined ADM and Minnesota Corn Processors will control at least 46 percent of domestic ethanol production? If so, do you believe proper scrutiny was applied by the Justice Department to ADM's acquisition of MCP?**

Answer: ADM's 1996 guilty plea to price fixing in the lysine and citric acid industries is one of the many relevant facts the Antitrust Division took into account in investigating ADM's proposed acquisition of MCP. The ultimate question in any merger investigation under the Clayton Act is whether the merger is likely to substantially lessen competition in any relevant market. The Division gave appropriately careful attention to this question with respect to all relevant markets.

Specifically with respect to ethanol, the investigation revealed that:

- 44 ethanol producers at 58 plants in 19 states have capacity to produce 2,311 million gallons of ethanol per year;
- 16 new producers have plants under construction this year, with total additional capacity of 427 million gallons of ethanol per year;
- ethanol is a commodity product, which is readily available to purchasers from multiple sources no matter where they are located; and
- entry into ethanol production and expansion of existing capacity is relatively easy for dry millers to accomplish.

Public sources showed ADM with approximately 41% of domestic ethanol production capacity and MCP with approximately 6%, with those shares dropping as new producers complete plants now under construction. GAO's recent report on ethanol indicates that their combined share will decline to 40% when these competing producers complete the plants now under construction, and to 25% by the year 2005 if all new plants that are now planned come on line.

In the light of these facts, the Division concluded that ADM's acquisition of MCP will not enable ADM to successfully maintain anticompetitive price levels, either unilaterally or in coordination with other ethanol producers, and thus that it is not likely to substantially lessen competition in the domestic ethanol market in violation of the antitrust laws.

Question 2: According to the complaint filed by the Justice Department on September 6th, "Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns under the DOJ and FTC guidelines." The General Accounting Office found ADM's acquisition of MCP will cause an increase of over 460 points for a new HHI of 2192. Does this mean the Justice Department has ignored its own merger guidelines? Doesn't a Herfindahl-Hirschman score of 2192 cause concern at the Justice Department?

Answer: The Department properly applied the Merger Guidelines to this transaction. As the Guidelines make clear, post-acquisition HHIs in the range of 2200 create a presumption that the acquisition may create or enhance market power or facilitate its exercise. But the Merger Guidelines also recognize that any such presumption may be overcome by evidence of other market factors that make it unlikely that the acquisition will create or enhance market power. As explained above in the response to the first question, the presumption of market power in ethanol created by the post-acquisition HHI in this case is overcome by other market factors.

Question 3: Mr. James, in the complaint filed September 6th the Justice Department states that the corn syrup markets are highly concentrated. According to the complaint, a combined ADM and MCP would account for about 30% of all corn syrup manufacturing capacity, 48% of all manufacturing capacity for one type of high fructose corn syrup, and 40% manufacturing of another type of sweeter high fructose corn syrup used in soft drinks. Why did the Justice Department intervene in the corn syrup market, and not take action against ADM and MCP in regards to ethanol when a combined ADM and MCP will account for at least 46 percent of domestic ethanol production capacity?

Answer: Market share and market concentration are an important aspect of every antitrust analysis, but they are not the ultimate determinative facts. As explained above, ADM's acquisition of MCP does not raise competitive concerns in the ethanol market because it does not appear that the transaction will lead to producer pricing of ethanol above competitive levels, a conclusion we reached after consideration of all relevant market factors. In contrast, corn syrup and high fructose corn syrup markets are very different from the ethanol market. Whereas the ethanol market is populated by numerous producers, with many more producers able to come on line in the very near future, the corn syrup and high fructose corn syrup markets are dominated by only five competitors in markets where new entry is quite difficult and unlikely in response to anticompetitive price increases. Had the Antitrust Division not intervened, the proposed transaction would have reduced the number of competitors from five to four and produced HHIs so large (well over 3000) as to raise potentially significant competitive concerns that were not overcome by the other relevant market factors. We intervened in the corn syrup and high fructose corn syrup markets because all of the relevant facts taken together indicated that ADM's proposed acquisition of MCP (absent the conditions we insisted upon) likely would have led to prices above competitive levels in these markets.

Question 4: In his letter of September 10th, Assistant Attorney General Daniel Bryant said new producers are expected to enter into the ethanol market to drive down the concentration numbers and he cited from a GAO report that 16 new producers have plants under construction as of January 2002. Do you know how many of these plants have been built? Do you know how many have entered into an agreement with existing ethanol producers to market their ethanol? Will these new entrants be able to ramp up production to meet the demands of the ethanol mandate in the Senate Energy Bill?

Answer: Our investigation did not focus on which of the 16 new ethanol building projects already have been completed. Nor did our investigation focus on whether the new plants will have marketing arrangements with other producers. However, we have no evidence that ADM is a party to any such marketing arrangements. To the extent that anyone has evidence that marketing arrangements exist which may violate the antitrust laws, we encourage reporting of that evidence to the Department for our review.

We understand that the most recent energy bill to pass the Senate would mandate almost a tripling in the use of ethanol in the United States by the year 2012. If this bill becomes law, it will cause a significant increase in the demand for ethanol over the next ten years, but producers will have many years to increase capacity and output to meet that demand. The ethanol industry has experienced much expansion recently, and we have no reason to doubt that the industry will be able to continue to expand as demand grows. Moreover, ADM's acquisition of MCP will not adversely affect the ability or incentives of producers to meet any future increases in the demand for ethanol.

Question 5: In the Competitive Impact Statement filed September 6th, the Justice Department states that successful entry into the corn syrup market is "difficult, time consuming, and costly." Doesn't the same apply for entry into the ethanol market?

Answer: No, entry into ethanol production is easier than entry into corn wet milling. Corn sweeteners are made by wet mill processing of corn. Ethanol can be produced by either dry or wet mill processing of corn. Dry mills are economical at a smaller scale than wet mills, and cost about half as much to build.

Question 6: In percentage terms, how much ethanol does ADM sell and market in the United States?

Answer: We calculate market shares using the best indicator of firms' future competitive significance. With respect to a commodity product such as ethanol, the best indicator ordinarily is physical capacity to produce the product because capacity is the measure that most effectively distinguishes firms in the market. Accordingly, the Division looked to ethanol production capacity (rather than dollar sales figures) to calculate market shares. Because dollar sales were not particularly significant for our purposes, the Division did not gather ethanol sales information or attempt to calculate ADM's market share based on total domestic sales of ethanol. Figures for production capacity are contained in the response to Question 1.

Question 7: In April the Wall Street Journal published a story about a series of documents implicating ADM in bid rigging with some of its ethanol competitors. I entered some of these documents into the Congressional Record and at the time the FTC and the

Justice Department said they would look into the matter. Is the Justice Department reviewing the allegations of ethanol bid rigging by ADM? When can we expect some results from this inquiry?

Answer: The Department is in receipt of the documents to which you refer and has been reviewing them. While the Department is unable to comment on possible investigations, you may be assured that the Department takes allegations of antitrust violations very seriously, and that if the Department concluded that violations had occurred it would vigorously prosecute.

Question 8: **As the General Accounting Office has stated, ADM will control at least 46 percent of the ethanol market once it acquires Minnesota Corn Processors. Williams Energy will now be ADM's largest competitor, but over the summer Williams announced plans to sell its ethanol plants to shore up its balance sheet. Will the Justice Department investigate ADM if the firm moves to purchase any ethanol plants from Williams?**

Answer: We are aware of those press reports. Should Williams Energy seek to sell its ethanol plants to ADM or to any other major ethanol producer, the Division will carefully review such a proposed transaction. If we determine that it would substantially lessen competition in violation of the antitrust laws, we will take appropriate enforcement action to protect competition in the affected markets.

Questions from Senator Cantwell

Question 1: **I understand that antitrust investigations, whether merger-related or nonmerger, can take substantial time.**

(a) Could you describe how long such files remain open on average, and about how many such files have been open for two years or more?

Answer: In recent years, the average investigation has lasted about six-and-a-half months. Merger investigations have averaged about four months. Civil nonmerger and criminal investigations generally take longer, both averaging around 18 months. As of the end of Fiscal Year 2002:

- There were 2 pending merger investigations that had been open for two years or longer. One was not an active investigation and was still open only because the parties refused to file the necessary documents to permit us to close.
- There were 16 pending civil nonmerger investigations that had been open for two years or longer.
- There were 58 pending criminal investigations that had been open for two years or longer.

The four-month average for merger investigations includes only mergers for which a formal investigation was opened. It does not include mergers subject to the Hart-Scott-Rodino Act, if no formal investigation was opened and the review was concluded prior to the end of the initial 30-day waiting period. Including those mergers would have dramatically reduced the average, to 34 days or less.

(b) Statistics aside, given the potentially adverse impact of extended investigations on the ability of the party under scrutiny to raise capital, enter into business relationships, or develop new market opportunities, and given that for many industries, the pacing of such activities has accelerated in recent years, do you agree that the Division needs to work to expedite antitrust inquiries? If so, could you describe what the Division is doing to accelerate investigations?

Answer: For the reasons you cite, I do agree with you that antitrust investigations should be conducted and concluded as expeditiously as possible. While the length of time an investigation requires depends on the complexity of the legal and economic issues, the number of parties and other participants involved, and the level of cooperation we receive from the parties and others, along with Division workload and resource considerations, Division attorneys and economists work to expedite their consideration of the issues wherever possible. Division practice is promoting this in a number of important ways. The reorganization of the Division more fully along industry and commodity lines, so that each attorney and economist will have a "beat to walk," is designed to strengthen each individual's focus and accumulated expertise within his or her industry and commodity area of responsibility. Among other things, this promotes more thorough and efficient conducting of investigations. The Division is also placing greater emphasis on beginning the legal and economic analysis at the outset of an investigation, with progress reports at regular intervals to ensure that an investigation is moving forward appropriately or, if not, to ensure that appropriate and timely consideration will be given to whether it should be closed. In addition, the Division is placing greater emphasis, where the parties being investigated are willing, on conducting discovery requests in a more cooperative and expedited fashion. By the same token, parties who elect not to cooperate should not benefit from planning such strategies. Accordingly, I have directed the staff to pay close attention to compliance matters and to more expeditiously seek to obtain judicial enforcement where necessary and appropriate.

Question 2: Can you please tell the Subcommittee what is the status of the Division's investigation of the five major record companies' online music ventures, Pressplay and MusicNet, and when you expect to complete the investigation?

Answer: The Division is in the midst of a thorough investigation, and will conclude it as expeditiously as possible consistent with sound antitrust enforcement.

Question 3: **Several of the major airlines have entered into an agreement, and have developed an online retail ticket service, Orbitz, which your Division is currently investigating.**

(a) Could you describe the status of the investigation?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): The Division is in the midst of a thorough investigation, and will conclude it as expeditiously as possible consistent with sound antitrust enforcement.

(b) One issue I understand is of concern to competitors is the "Most Favored Nation" provision contained in the agreements between Orbitz and the airlines that own Orbitz. Could you describe the implications of this provision?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): A most-favored-nation ("MFN") clause in a contract guarantees to one party that if the other party gives any other person a more favorable deal in the future, the first party will be entitled to the same more favorable deal. In the case of Orbitz, the airlines participating in the creation of the Orbitz joint venture, as well as the airlines who have signed a distribution agreement with Orbitz, have promised to supply all of their publicly available fares to Orbitz.

(c) Do you have a view on such provisions, i.e., do you consider such provisions appropriate and acceptable to the Division in such circumstances?

Answer (from Deputy Assistant Attorney General R. Hewitt Pate): While most-favored-nation clauses do not produce the same kinds of competitive effects in all markets, they can and do raise specific competitive concerns in the Division's analysis of supplier-owned joint ventures. The competitive issues most frequently raised by MFN clauses are whether the MFN clause: (1) serves as a mechanism to reduce horizontal competition between the joint venture supplier participants; (2) reduces incentives for the joint venture supplier participants to do business with competitors of the joint venture; or (3) reduces incentives for the joint venture's independent competitors to enter into relationships with the joint venture's supplier participants because the competitors know that the participants are required to offer the same terms to the joint venture. Whether an MFN clause in a supplier-owned joint venture agreement undermines the ability of an independent firm to compete depends on multiple case-specific factors, such as: (1) the specific content and operation of the MFN clause; (2) the type of products or services provided by the joint venture; (3) the impact of the MFN clause on barriers to entry in the relevant market; (4) whether the MFN clause produces efficiencies, and the nature of those efficiencies; (5) the market shares and market positions of the joint venture participants; and (6) the structure of the relevant markets.

SUBMISSIONS FOR THE RECORD

United States Senate
Committee on the Judiciary

September 19, 2002

"Oversight of Enforcement of the Antitrust Laws"

Subcommittee on Antitrust, Competition, and Business and Consumer Rights

STATEMENT OF THE AIR CARRIER ASSOCIATION OF AMERICA

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STATEMENT OF
EDWARD P. FABERMAN
EXECUTIVE DIRECTOR
AIR CARRIER ASSOCIATION OF AMERICA

At a time when there are fewer airlines competing in the United States air carrier industry than at any time since deregulation, we are witnessing proposals that may forever change the competitive structure of the industry and may further close the door to true competition and deregulation. These proposals involve a US Airways and United Airlines alliance and a Delta Airlines/ Northwest Airlines/Continental Airlines alliance.

As a result of these alliances, control of the nation's market share will be as follows.

AMERICAN	19.45%
UNITED/US AIRWAYS	23.3%
DELTA/NORTHWEST/CONTINENTAL	35.24%
LARGE CARRIER COMMUTERS	4.41%
MAJORS TOTAL	**82.43%**

Other carriers would have the market shares below.

SOUTHWEST	7.08%
AMERICA WEST	3.05%
ALASKA	2.12%
ATA	1.94%
JET BLUE	1.04%
AIRTRAN	.85%
SPIRIT	.67%

FRONTIER	.55%
MIDWEST EXPRESS	.27%
INDEPENDENT TOTAL	**17.57%**

In individual markets, the concentration is more alarming!

Atlanta (ATL)

Carrier	**Percent Market Share**
United / US Airways	3.07
American 1	1.69
Continental/Delta/NW	83.34
Total*	**88.1**

Boston (BOS)

Carrier	**Percent Market Share**
United / US Airways	40.25
American	17.15
Continental/Delta/NW	36.32
Total	**93.72**

Charlotte

Carrier	**Percent Market Share**
United / US Airways	92.73
American	1.94
Continental/Delta/NW	4.18
Total*	**98.85**

Chicago- O'Hare (ORD)

Carrier	**Percent Market Share**
United / US Airways	52.14
American	34.94
Continental/Delta/NW	6.16
Total*	**93.24**

1 Includes numbers from TWA

Cincinnati (CVG)

Carrier	Percent Market Share
United / US Airways	1.10
American	1.17
Continental/Delta/NW	96.22
Total*	**98.49**

Denver (DEN)

Carrier	Percent Market Share
United / US Airways	69.77
American	4.71
Continental/Delta/NW	10.33
Total*	**84.81**

Los Angeles (LAX)

Carrier	Percent Market Share
United / US Airways	31.19
American	22.36
Continental/Delta/NW	15.05
Total*	**68.60**

Miami (MIA)

Carrier	Percent Market Share
United / US Airways	10.6
American	66.5
Continental/Delta/NW	9.96
Total*	**87.06**

New York- Kennedy (JFK)

Carrier	Percent Market Share
United / US Airways	16.86
American	39.43
Continental/Delta/NW	27.54
Total*	**83.83**

New York-LaGuardia (LGA)

Carrier	Percent Market Share
United / US Airways	27.72
American	21.73
Continental/Delta/NW	34.86
Total*	**84.31**

New York-Newark (EWR)

Carrier	Percent Market Share
United / US Airways	7.97
American	7.54
Continental/Delta/NW	78.39
Total*	**93.9**

Philadelphia (PHL)

Carrier	Percent Market Share
United / US Airways	74.46
American	7.36
Continental/Delta/NW	10.17
Total*	**92.09**

Pittsburgh (PIT)

Carrier	Percent Market Share
United / US Airways	86.89
American	5.33
Continental/Delta/NW	3.15
Total*	**95.37**

Washington- Dulles (IAD)

Carrier	Percent Market Share
United / USAirways	76.46
American / TWA	8.29
Continental/Delta/NW	12.2
Total*	**96.95**

Washington- National (DCA)

Carrier	Percent Market Share
United / USAirways	48.25
American / TWA	14.45
Continental/Delta/NW	32.22
Total*	**94.92**

The proposed alliances involve much more than codesharing. The DL/NW/CO alliance includes:

- Reciprocal frequent flyer programs - The three carriers' individual frequent flyer programs would effectively be merged.
- Reciprocal airport lounge access - The three carriers' individual airport lounge programs would effectively be merged.

- Coordinated "inventory management" - The three carriers will cooperate in a system to manage and sell each other's inventory so as to maximize total sales. This is especially significant given that price competition among hub airlines is effectuated largely through the management of inventory (*i.e.*, the number of seats available at a particular price), rather than via published price levels, which are invariably the same among those carriers.

- Coordination and alignment of schedules - The carriers state they will "align" their flights in unspecified ways to enhance connecting opportunities among them; the agreement goes so far as to specify that the carriers will exchange new schedule data in advance, synchronize the filing of new schedules, and use "best efforts to advise each other prior to Load Date of ad hoc schedule changes." This suggests that the three carriers will not only pervasively coordinate their existing schedules but signal each other as to future, planned schedule changes.

- Coordination of airport facilities - The carriers intend to relocate ticket counters, gates, flight operations and related airport facilities to be contiguous or close to each other on a "high priority basis" at certain airports. This of special concern given the long history of hub airlines using airport facilities as competitive weapons to deny effective access to competing airlines.

- Joint passenger processing - The agreement states that the carriers will "jointly develop passenger processing and check-in procedures" (including reciprocal electronic check-in kiosks and Internet check-in procedures) at stations that at least two of them serve. This suggests, again, that the carriers intend to have wide (if not full) access to each other's passenger sales information and inventory.

- Coordinated reservations displays - The carriers intend to integrate their internal reservations systems to display each other's codeshare flights. On external CRS's, the carriers presumably expect to *triple* their exposure to travel agents simply by entering into the codeshare agreement without adding new service.

- Coordinated sales and marketing - The carriers intend to coordinate their sales and marketing programs; presumably this means they will aggregate their travel agency commission override and corporate incentive programs. The carriers also agree to "meet and confer to discuss opportunities to use technology to improve codesharing, sales and marketing, customer service and passenger handling..."

- Code-sharing in domestic markets - Although much of the terms are redacted, it appears that the carriers intend to codeshare on all or substantially all of each other's U.S. flights, including those operated by their regional carrier affiliates.

- "Seamless service" - This seems to be a catch-all for additional types of cooperation planned by the carriers regarding facilities, operations, and passenger handling, with the objective of appearing to the public essentially as a single, combined entity.

The alliances *go far beyond* any code-sharing or other marketing agreement permitted to date by the government among domestic air carriers. These two alliances would allow these airlines to engage in an unprecedented degree of cooperation and joint activity that could patently diminish competition among them, allow them to act in concert against other (non-aligned) airlines, and inescapably lead to higher fares and fewer service options for consumers in many markets.

The large carriers admit that they work to destroy competition.

> Competition among airlines for dominance at major U.S. airports is virtually a thing of the past, the chairman of Continental Airlines said on Monday.
>
> Continental chief executive Gordon Bethune, in a break from the usual industry line that competition reigns supreme, said the large air carriers have staked out their respective hubs and will be difficult to dislodge.
>
> 'In the last 20 years, the marketplace of the United States has been sorted out. American [Airlines] kind of controls Dallas-Fort Worth and Miami and we've got Newark, Houston and Cleveland. Delta's got Atlanta," Bethune said in remarks to the National Defense Transportation Association annual conference.
>
> 'Nobody's going to start a new airline and take on American Airlines with 800 departures (daily) from Dallas, Texas. They're [American] just going to win,' he said.
>
> Bethune said there is still competition among the airlines for passengers who have the option to go through different hubs.
>
> 'But dominance in the major cities is decided,' he said. 'There are no two airlines that can co-exist in a major city profitably, other than Chicago where the government restricts the number of takeoffs and landing.'
>
> 'So, that's done in our country and it kind of works,' he said.
>
> ["Continental Chief says hub competition over," Reuters News Release, October 26, 1998, as quoted in Levitates, Senate Committee on the Judiciary, May 27, 1999, p. 3]

> Last year, because we [Continental] were able to offer better discounts than United for Newark to San Francisco and Newark to Los Angeles, and because we were able to offer those discounts to the people in Boston, United put in a four jet operation, four times a day from Boston to Newark. We said, "Boston to Newark?"
>
> "What the heck's United coming in for -- we ran USAir out of there some years ago." So we put four flights between L.A. and San Francisco. Get that? You do

that stuff to us, we do that stuff to you. Now they're [United] down to one flight and I think we'll pull out.

When you have 20 percent of the market [Continental and Northwest combined], United will say, "You know what, between those two guys they might put 100 flights into L.A. Screwing with one might be the same as screwing with the other." Now, as a joined-at-the-hip partner with Northwest, you better watch out if we do get upset. We have a lot of different ways that we can pay you back.

Gordon Bethune, President and CEO of Continental Airlines
Business Travel News, February 23, 1998

Airline consolidation would not only promote efficiency but would help reduce excess capacity.

Leo Mullin, Delta Airlines

If these alliances are permitted to proceed, competition, travelers, and communities will suffer consequences over the short and long term. Unless the Department takes clear action to block the alliances or takes away assets (airport facilities and high density slots) to provide to the new entrants:

- Service will be reduced;
- Concentration levels will increase;
- Fares will increase; and
- Choice will be a thing of the past.

Some carriers have chosen to avoid competing with the major carriers altogether, rather than face predatory tactics. As Midway Airlines' president made clear....

Midway is reluctant to compete with any large carrier.

It is my belief that in order to start - and perhaps more important, to survive – in this industry, an airline must: One, build a business plan that is not premised upon cream skimming the routes of the major carriers.

We have consciously avoided picking fights with major airlines by flying directly into their hubs. This strategy has avoided the bruising battles that your Committee has heard about repeatedly from new airlines, which some call predation.

[Robert Ferguson, Senate Judiciary Committee, Antitrust, Business Rights & Competition Subcommittee, May 2, 2000]

Unfortunately, Midway has been driven out of business. When competition disappears from markets, fares go up. Midway's departure from Raleigh-Durham makes this point.

With The Elimination Of Competition In Raleigh-Durham Fares More Than Doubled

	Washington-National					New York-La Guardia				
	Midway Then		US Airways Now		% CHG	Midway Then		US Airways Now		% CHG
Walk-up	$99		$392		296%	$145		$506		249%
3-AP			342					456		
7-AP	87	*1				118	*1	202	*S	71%
	48	*1				66	*1			
14-AP	54		142	*S	163%	94		126	*S	34%
			132	*S				116	*S	
21-AP			69	*S				81	*S	

Notes: Midway shutdown on July 17, 2002
Midway cancelled fares on July 18, 2002
US Airways increased fares effective July 19,2002
All fares shown one-way, some may require roundtrip purchase
*1 fares require a 1-night minimum stay

We cannot allow this anti-consumer trend to continue. The Department needs to meet its responsibilities. These alliances are in conflict with the principles of the Airline Deregulation Act of 1978, including:

> [T]he Secretary of Transportation shall consider the following matters, among others, as being in the public interest....
>
> (4) The availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices....
>
> (9) Preventing unfair, deceptive, predatory, or anti-competitive practices in air transportation.
>
> (10) Avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier...unreasonably to increase prices, reduce service, or exclude competition in air transportation.

> (11) Maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities....
>
> (13) Encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry. (49 U.S.C. §40101)

Allowing these alliances I also inconsistent with the Department of Transportations' own studies; which describe the devastating impact to consumers when competition does not exist:

"Dominated Hub Fares" Select Quotes
Office of the Assistant Secretary for Aviation and International Affairs at the Department of Transportation, January 2001

> In dominated hubs as a whole, 24.7 million passengers pay on average 41% more than do their counterparts flying in hub markets with low-fare competition. It is reasonable to expect that with the benefit of low-fare competitors another 25 to 50 million passengers annually would travel in these markets.
>
> * * * * *
>
> Passengers in short-haul hub markets without a low-fare carriers pay even higher fares, or 54% more on average than passengers in comparable markets with a low-fare competitor.
>
> * * * * *
>
> Without the presence of effective price competition, network carriers both charge much higher prices and curtail capacity available to price sensitive passengers at their hubs.
>
> * * * * *
>
> The key to eliminating market power and fare premiums is to encourage entry into as many uncontested markets as possible.
>
> * * * * *
>
> Barriers to entry at many non-hub markets have the same effect of discouraging new entry. [B]arriers to entry at dominated hubs are most difficult to surmount considering the operational and marketing leverage a network carrier has in its hub markets.

"Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry" Select Quotes
Docket OST-98-3713, "Findings and Conclusions on the Economic, Policy, and Legal Issues"

> Competition gives travelers lower fares and better service, and the lower fares enable many people to fly who otherwise would not have traveled at all. While deregulation has given travelers in the great majority of markets lower fares and better service, some markets have not benefited as much from deregulation since they lack competitive service.
>
> * * * * *

> Travelers are not the only beneficiaries of increased competition. Regions where the lower fares and increased service options created by competition are available are better able to attract new businesses and business expansions; conversely, regions denied access to competitive service suffer economic difficulties.
>
> * * * * *
>
> Travelers in markets with low-fare airline competition, on the other hand, obtain both the low fares offered by low-fare airlines and the more frequent service and wider range of destinations offered by a hubbing airline.
>
> * * * * *
>
> New service by a low-fare airline is therefore likely to be the only way that many hub markets will ever benefit from competitive airline service. Since a hubbing airline will likely have only limited competition in most of its hub markets if it can deter entry by low-fare airlines, it is profitable for an incumbent airline to attempt to eliminate actual competition if it can…If the low-fare airline becomes established in one hub market, it may well expand into other markets at the hub.
>
> * * * * *
>
> The public's ability to obtain low-fare service should not depend on the success of a single airline.
>
> * * * * *
>
> We note, moreover, that one network airline—US Airways—complained that United greatly increased its capacity at Washington Dulles Airport in order to force US Airways' Metrojet operations out of Dulles markets.
>
> * * * * *

The comments filed by Rochester parties and other upstate New York parties demonstrate how the lack of low-fare airline competition causes substantial harm to a community's economy. Thomas Mooney, the President of the Greater Rochester Chamber of Commerce, stated,

> There is a correlation between the high cost of air travel and the slow rate of growth for the upstate economy. Ultimately, these firms must pass on these costs on to customers when pricing their goods and services. *** The disparity in airfares has also caused a growing number of Rochester area businesses to hold their sales meetings in other cities… *** Worse still, some Rochester companies have even relocated certain operations to other cities.
>
> * * * * *
>
> In markets without much low-fare service, short-haul markets are generally responsible for a greater proportion of the fare premiums. Long-haul markets—even those without low-fare competition—have connecting service among network carriers, which brings about more competitive prices. Short-haul markets (particularly those out of a dominated network hub) lack connecting competition, and are more likely to have higher fare premiums if low-fare service is not present as a competitive factor. At US Airways' network hub in Pittsburgh, for example, where there is little low-fare service, short-haul markets have a fare premium of sixty-one percent over fares in comparable industry markets. In long-haul markets, where US Airways is subject to connecting competition from other network carriers, Pittsburgh's fare premium is only nine percent. Conversely, where an

> airport's low-fare competition is clustered in its short-haul markets, the short-haul fare premium is low.
>
> "Domestic Airline Fares Consumer Report: Fourth Quarter 2000 Passenger and Fare Information," "*Special Feature: Fare Premiums by Airport,*" June 2001, US. Department of Transportation

The amount of time allowed by the Department for public comment on these significant agreements is far too short to permit the kind of detailed review and analysis needed for complex agreements that could forever change airline markets. (45 days on the UA/US alliance and less than 30 days on the DL/NW/CO alliance.) The Department has the authority to extend the waiting period up to 150 days for code-sharing agreements and up to 60 days for other types of agreements. The Department should not rush to review these proposals but should take the time necessary to fully assess their impact on airline competition, consumers, and communities from throughout the country.

Caution is especially prudent in today's airline industry environment. U.S. carriers continue to suffer financial difficulties due to factors such as a weak economy and airport security hassles. The two alliances now under consideration have the potential to *permanently* restructure the competitive dynamics of the U.S. airline industry. Consequently, the government must act with prudence and deliberation to analyze the long-term impact of these agreements before deciding whether to allow them to take effect.

The same competitive concerns that led the Department of Justice and a group of states to block the proposed United/US Airways merger 14 months ago are present in the UA/US alliance proposal, and even greater competitive concerns are presented by the much larger DL/CO/NW alliance. Acting as single entities, these alliances would have the resources and dominance to stifle competition from non-aligned carriers in a great many markets throughout the country. The alliances are undoubtedly designed to strengthen the already dominated hubs of the partner airlines against non-aligned carriers, and consumers in those markets are likely to suffer as a result.

The Department needs to take two immediate steps:

1. Combine both proposals in a single docket; and
2. Extend the comment period for both proposals.

Consolidating the proposals into a single proceeding will allow consideration of their *combined* effects on competition and consumer welfare. To evaluate them on a piecemeal basis would understate their true magnitude, and ignore the reality that the DL/CO/NW agreement was entered into only as a response to the UA/US alliance that was announced one month earlier. In addition, the proponents should be required to disclose the details of the agreements and justify them by offering evidence of consumer benefits. By doing, so the Department will ensure that the alliances and the claims of their proponents are subjected to critical review and analysis.

Given the magnitude of these proposals and the profound impact they will have on airline competition, the Department should take care to evaluate them in an open and deliberative process; which provides the thorough consideration they require. Therefore, the Department needs to immediately take the following steps:

1. Extend the waiting periods for both alliances to the maximum extent possible under Section 41720, *i.e.*, to 150 days for the code-sharing aspects of the proposals and to 60 days for other aspects;

2. Consolidate both alliances into a single proceeding in order to fully consider their competitive effects together;

3. Establish a public docket for consideration of the proposals in order to provide full transparency of the applicants' representations and the Department's actions with respect to the alliances;

4. Require the applicants to make available complete copies of the alliance agreements, so that critical terms now redacted (*e.g.*, which airports the carriers plan to consolidate their facilities, and what markets they plan to engage in code-sharing) are disclosed; and

5. Require the applicants to submit any evidence of the alleged consumer benefits of the alliances, and an explanation of how the alliances will generate additional revenue and traffic, as the applicants have claimed.

6. Take necessary actions to ensure that other carriers are able to compete in markets controlled by either a US Airways/United Airlines alliance or a Delta/Northwest/ Continental alliance before either alliance is approved. These steps must include the redistribution of slots held by those five carriers at high density airports and providing gates and airport facilities to new entrants/smaller incumbents at any airport in which one of the proposed alliances controls more than a 30% market share.

Unless these steps are taken, the future of airline competition and deregulation will be at risk.

> It was important to provide choices for the public and to serve smaller cities, as well as provide access for competing carriers and a level playing field for new entrants. He [Secretary Mineta] said DOT's role is to bring these factors into consideration.
>
> House Transportation Committee Hearing
> April 4, 2001

Unless the Department acts to ensure the future of competition, the word "choice" will no longer be uttered by the Secretary!

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The American
Antitrust Institute

STATEMENT
OF

ALBERT A. FOER, PRESIDENT,
THE AMERICAN ANTITRUST INSTITUTE,

TO THE
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS, AND COMPETITION,

SENATE JUDICIARY COMMITTEE,

SEPTEMBER 19, 2002,

REGARDING OVERSIGHT OF THE FEDERAL ANTITRUST ENFORCEMENT AGENCIES

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Mr. Chairman and members of the Subcommittee:

The American Antitrust Institute is pleased to respond to your request for comments on the performance of the two Federal antitrust enforcement agencies.

The American Antitrust Institute

The American Antitrust Institute is an independent research, education, and advocacy organization that believes the laws and institutions of antitrust ought to play a large role in the national and world economy. We are non-partisan and have been called a public interest "watchdog" but we do have a general point of view that can be described as "post-Chicago" and pro-enforcement. This no doubt colors our view of an Administration that we would describe as "Chicago" in its basic orientation. Our Advisory Board includes four former Assistant Attorneys General for Antitrust, several State Assistant Attorneys General for Antitrust, the godfather of deregulation (Alfred Kahn), a former Chair of this Subcommittee (Senator Howard Metzenbaum), and numerous accomplished law professors, economists, and business professors, as well as practicing antitrust lawyers. While they provide input and reactions, these Advisors do not vote on our positions and statements like this one do not purport to represent their individual or collective views. Background on the AAI is at www.antitrustinstitute.org.

Overview

The Federal antitrust enforcement effort is blessed with bipartisan and widespread support. We urge most strongly that the Administration's budget request for the FTC and the Antitrust Division be granted, to assure a continuing level of personnel resources in this labor-intensive endeavor that is so important to the American consumer.

When Timothy Muris and Charles James took office as Chair of the FTC and Assistant Attorney General for Antitrust, they both made speeches emphasizing continuity. Chairman Muris, speaking to the AAI's conference in his first address as

Chairman, paid homage to his predecessor Robert Pitofsky and focused attention on their similarities of thought, although certainly not hiding some important differences.[1]

But this Bush Administration has been in office for about a year and a half now and it is not always easy to see the continuity, particularly at the Antitrust Division. In general, it can be said that the Federal agencies today are at most modestly active, compared to the recent past; the FTC is showing much more energy and better results than the DOJ, whose performance in the landmark Microsoft case and overall has been disappointing; and some of the agencies' activities, consistent with their more conservative philosophy of antitrust, are devoted to working on ways to reduce rather than expand the scope of antitrust enforcement. Although there is substantial rhetorical continuity with the recent past, which we commend, the record suggests that the continuity may be more with the first Bush Administration (which indeed had a more enforcement-oriented record than the minimalist Reagan Administration), rather than with the more activist Clinton Administration.

We will look in turn at merger enforcement, civil non-merger enforcement, criminal antitrust enforcement, and issues of style and management. In each case, we start with some numbers from fiscal year 1997 to present, that are more extensively reported in an appendix to this statement, and then we'll move to a more qualitative evaluation of accomplishments and failures. Our numerical data was provided by the DOJ and FTC or

[1] 52 Case W.R.L.Rev. 25 (2001), available at http://www.antitrustinstitute.org/recent2/171.cfm.

comes from their web sites and covers all but the last two weeks of this fiscal year.[2] The Subcommittee may have more complete data, but I doubt that it would change the thrust of these comments.

Merger Enforcement

The nation has gone through an unprecedented merger wave, which has now slowed down, at least temporarily. It would be too large a task, although an invaluable one that needs to be undertaken, for us to try to evaluate in this statement how well our antitrust effort coped with this wave. We will focus instead on comparing the two agencies in their merger activity from fy 1997 to present. The numbers for fy 2001 should be assumed to reflect a certain amount of carry-over from the previous Administration.

How many merger/joint venture cases have the two agencies actually brought?[3] The data indicates that the FTC number has declined slightly in the past two years (from 32 enforcement actions to 23), being somewhat less than in any of the preceding four years. The DOJ numbers for cases filed has fallen off more sharply, from 21 in each of 1999 and 2000 to 9 last year and only 4 this year.

Keep several things in mind as you reflect on these merger numbers. First, throughout these years, the Antitrust Division and the FTC have had roughly equivalent financial resources, but only half of the FTC's budget is devoted to antitrust, meaning that two-thirds of the Federal antitrust resources are at DOJ.[4] Thus, the FTC would appear in both the Clinton and the current Bush administrations to be using its resources far more productively to open merger and joint venture cases.

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[2] We report the numbers as provided by the agencies. It is not always clear that they reflect the same activities for each agency, that activities are counted in the same way, or that the accounting remains constant from year to year. Some effort at standardization of reporting would be useful.

[3] Some joint ventures are handled under the Clayton Act by merger analysis, others may be challenged on the basis of other types of antitrust analysis. We are not sure how the agencies account for them in the numbers we are using.

[4] For information on the budget history of the two agencies, see http://www.antitrustinstitute.org/recent2/190.cfm. Data for fy 1999 through 2003 is in the appendix to this statement.

There are three possibly mitigating factors to consider. First, the DOJ output is understated because of reporting differences. (The Subcommittee might want to consider ways in which the two agencies could harmonize their reporting.) DOJ often closes investigations that have led to some form of restructuring by the parties, issuing a press release, at most, rather than filing a complaint and settlement order. Such informal closings are not counted in the numbers I've cited.[5] (The FTC does not do 'fix-it-first' hence does not include such cases in its numbers.) Giving these some weight reduces the gap between FTC and DOJ activity, but they do not change the conclusion that there has been a dramatic fall-off in DOJ merger activities during the current Administration. For instance, the number of "fix-it-first" cases has dropped from 20 last year to only 5 this year.

The so-called "fix-it-first" practice needs to be re-evaluated in light of the general desirability of greater transparency. This process does not come under the Tunney Act, and thus the public is not provided with much of the information that would give it an opportunity to evaluate and comment on the settlements. No court reviews whether a compromise is in the public interest. Moreover, if the voluntary "fix-it" effort by the companies fails to "fix it," there is no breach of a settlement order for enforcers to work from.

Another important area of divergence between the two agencies is in the area of merger remedies. The FTC frequently requires the selection of a buyer for the divested assets before the consent order is approved (an "up-front buyer"). It will ofen require a more comprehensive package of assets to be divested and sometimes uses a trustee to assure that the divestiture is successful. The DOJ does not require any of these provisions. Moreover, the FTC shows a far greater commitment to transparency on remedies: it discloses more information on the divestiture process and is holding a series of workshops on merger remedies. We urge the Subcommittee to focus on the differences that exist between the FTC and the DOJ with respect to merger remedy procedures and

[5] Figures for 'fix-it-first' transactions that were restructured or abandoned prior to filing a complaint as the result of an announced challenge by DOJ are in the appendix, as are figures for cases that were abandoned by the parties before or after filing a complaint.

standards, and to consider legislating that the same standards, including the Tunney Act, apply to both agencies, in so far as feasible. (The main difference for the FTC would be that under the Tunney Act it would then have to respond to public comments.) The Tunney Act itself, as was demonstrated in the on-going Microsoft case,[6] needs to be re-written and strengthened if it is to accomplish the goals that are set out in its legislative history.

Secondly, in looking at merger numbers, it should be noted that the number of mergers has fallen off quite substantially in the past year and that the legislatively-raised threshold of mergers that must be reported under the Hart-Scott-Rodino premerger notification law has played a role in dramatically reducing the number of transactions reported to the agencies. But these facts should not have a differential effect on the comparative output of the two federal agencies.[7]

Third, the number of cases brought could be misleading. For instance, if corporate counsel were convinced that the agencies were going to be tough on certain kinds of mergers, they might convince their clients not to contemplate ventures that would in all likelihood be challenged. Thus, an aggressive administration could in theory cause a reduction in cases just by a combination of tough talk and a few strong actions. But this scenario does not appear to be applicable today. We have not heard tough rhetoric or witnessed strong cases intended to demonstrate a hard line, other than in a few narrow areas, such as the commendable efforts to stop trigger-jumping (companies acting as if a merger were legal prior to completion of the H-S-R review) and to put companies on

[6] The AAI's lawsuit against the DOJ and Microsoft, seeking a 'strong' interpretation of the Tunney Act in the Microsoft case, calls attention to areas in which improvements are needed. See http://www.antitrustinstitute.org/recent2/164.cfm.

[7] The appendix provides statistical data on HSR premerger notifications, second requests, and other aspects of merger enforcement. Two key figures to examine are the percentage of transactions for which second requests were issued and the percentage of second requests that end up in enforcement actions. We do not have current year numbers to present. In recent years, the FTC has taken action in a much higher percentage of investigations where a second request was issued. Given that the agencies were admittedly understaffed during the recent merger wave, one would have predicted that with a reduced number of transactions resulting from the increase in reporting threshold as well as the slow down in merger activity, that the percentage receiving second requests would go up, perhaps would double, in fy 2001 and 2002. The Subcommittee, when it obtains current numbers, might want to inquire along the above lines.

notice that mergers too small to meet the notification threshold will still be subject to scrutiny.

Turning from quantity to quality and mentioning only what seem to be highlights and lowlights-- on the positive side, the DOJ held firm against a United-USAirways merger (an investigation begun by the Clinton Administration), causing it to go away. DOJ has also taken a strong position against the request for antitrust immunity by two airlines in Hawaii seeking the ability to jointly reduce capacity—not exactly a merger, but relevant nonetheless. DOJ also stopped a merger in the nuclear submarine industry that would have created a monopoly. DOJ also brought an important case against gun jumping and is endeavoring to clarify the rules in this complex area. It has brought one case below the H-S-R reporting threshold, obtaining a consent decree. And DOJ has initiated some experiments in the reform of the merger review process.

The FTC has some important accomplishments that go beyond the simple numbers. It stopped mergers that would have created duopolies in baby food and in glassware manufacturing. It secured disgorgement of illegal supracompetitive profits from a merger that led to a monopoly in the drug database market. It has successfully challenged mergers below the HSR thresholds in administrative litigation; in one case securing comprehensive relief in an important software market used by the Department of Defense. And it has continued enforcement actions in critical pharmaceutical and biotech markets securing relief in future life-saving products. It has resurrected attention to hospital mergers, an important area of concern that had been taken off the front burner after a number of defeats in litigation. It also has initiated an examination of merger review procedures and remedies, conducting several public workshops on the subject. It is worth noting that the two agencies are reviewing their merger review procedures separately rather than trying to harmonize procedures more.

Both agencies have, correctly, given a high degree of attention to high-technology mergers in the face of rapid consolidation. In SunGard Data Systems, the DOJ lost a challenge to a merger of two of the three computer data recovery firms. The FTC has paid a great deal of attention to Internet mergers, successfully opposing the merger of Monster.com and hotjobs.com. But there could be signs of change. In Synopsis/Avanti,

the FTC failed to challenge a vertical merger that could have foreclosed competitors in an important software market, an action that seems inconsistent with its 1997 challenge of the Cadence/CCT merger. Three FTC Commissioners said the FTC would still look for future anticompetitive conduct, but the significance of a statement by three Commissioners rather than the entire Commission seems questionable. In Synopsis/Avanti, the FTC terminated the waiting period early and allowed the merger to close, but continued the investigation (before finally closing it), reminding companies that enforcers will continue to scrutinize some deals after they close and will unwind them if they raise competitive concerns. Both agencies have forced the restructuring of various mergers, high tech and other, as a condition of non-intervention. Opining on whether such conditions are appropriate often requires a level of information that is not made available to the public.

On the negative side, the DOJ perhaps unnecessarily upset their colleagues in Brussels by exaggerating their differences over the GE-Honeywell merger and denigrating the EU's analytical powers. This has required a lot of kissing and making up, but it is not clear that relations with the EU are as warm today as they were during the previous Administration. On the other hand, the directness of the DOJ's approach has apparently led to some serious re-thinking in Europe of certain positions.

We await the outcome of two DOJ investigations that have gone slowly but are of importance to consumers: the Orbitz joint venture in the sale of airline reservations and the EchoStar/Direct TV merger that will create a monopoly for multichannel video in rural areas and a duopoly in most urban areas, both of which AAI has criticized as anticompetitive. The FTC permitted (with modest conditions) the Nestle-Ralston merger in the pet food industry, which we believed was anticompetitive. Recently, it was reported that the FTC staff has recommended non-intervention in the cruise line industry, where both the number one and number two companies in a concentrated market are fighting each other to acquire the number three company. We also oppose both of those mergers and are concerned about the arguments that reports speculate are at the center of the staff's analysis.

The AAI is also concerned about a potential change in enforcement philosophy at the agencies. Merger cases focus on two types of competitive effects: the ability of the merged firm to raise prices on its own (i.e., unilateral effects) or raise prices in conjunction with its rivals (i.e., coordinated effects). DOJ officials have given several speeches discussing the need to focus on the potential for coordinated effects. Although that effort is laudable, especially in light of the numerous international cartel cases prosecuted by DOJ over the past several years, we are concerned about a potential downgrading of the potential threat of unilateral harm. Most of the merger challenges in the 1990's were based on unilateral concerns and abandonment of those theories would have made it very difficult to challenge mergers such as Staples/Office Depot and Cardinal Health, which ultimately saved consumers hundreds of millions of dollars.

Non-Merger Civil Enforcement

Turning to non-merger activities of the agencies, the story seems to be similar, with the FTC having a more aggressive enforcement agenda. The FTC has opened over 50 investigations in both FY 2001 and 2002, far more than during any year in the Clinton Administration. DOJ in contrast is far below historic levels during the past two years. In terms of enforcement actions in FY 2002, the FTC has 9 enforcement actions and the DOJ has 4.

On the positive side, DOJ has continued to pursue all of the civil nonmerger cases in litigation brought during the prior administration. It appealed the American Airlines case, after a District Court decision that castigated this important effort to reinvigorate predatory pricing doctrine. It continued to pursue the case against exclusionary practices by VISA and Mastercard, and illegal monopolization by the leading false teeth manufacturer.

The FTC's most significant accomplishments are in the area of pharmaceuticals and health care. The FTC expanded the Clinton Administration efforts in the pharmaceutical area, helping to protect the availability of low priced generic drugs. It brought several pharmaceutical enforcement actions in blockbuster drug markets. The FTC also issued an important report on generic drug competition, using its unique statutory power to

subpoena information to conduct studies. In addition the FTC has brought several cases challenging unlawful price fixing by health care provider groups.

The two agencies have held extensive hearings on the interplay between antitrust and intellectual property, an area that is clearly of great importance. It is not clear whether there will be a report or other outcome, beyond the generation of a substantial body of information and opinion.

The FTC has devoted resources to the narrowing of the Noerr-Pennington and the state action doctrines, which may be particularly useful in the area of drug companies using common administrative filings as a defense to antitrust allegations. The FTC also recently initiated a workshop on possible anticompetitive actions at the State level and in the private sector relating to e-commerce. While the purposes are commendable, it was unfortunate that the announcement seemed to condemn the States as much as focus on the possible problem areas. Both agencies have made the Chicago School point that government action is the likely cause of most market failures, and so they not infrequently seem to be attacking the exercise of State powers.

On the negative side, the DOJ has, the numbers show, given civil non-merger enforcement a very low priority. This is reflected in an organizational reform that reduced the role for this function. The principal case in this area is, of course, the highly controversial Microsoft case. AAI, like many observers, has criticized the DOJ's decision to settle on terms that we believe fail to cope with the anticompetitive problems that were revealed in the case. In keeping with Chicago School priorities, DOJ seems to have put monopolization and vertical restraints, including retail price maintenance, almost entirely out of mind.

The FTC has gone back and forth with the Senate Small Business Committee on the subject of slotting allowances in the retail food industry. This is a subject in which the AAI has taken a strong interest and found, thus far, that the FTC has not acted very aggressively. The FTC will soon complete a slotting fee study for which Congress gave it nine hundred thousand dollars in the expectation that the FTC would utilize its compulsory process power in order to obtain information that the Senate and the GAO

had been unable otherwise to document. FTC staff reportedly informed the Senate that subpoenaing companies over slotting fees would embroil the agency in a protracted legal war, and they wanted to see what could be achieved by first seeking voluntary compliance. We will be waiting to see where the FTC report leads.

Criminal Antitrust Enforcement

The DOJ continues to investigate cartels and other price fixing activities under its criminal enforcement program. This is an area in which there appears to be a high degree of philosophical continuity with the previous Administration, which set new records in its activism, particularly in the international cartel arena. The numbers today, however, reflect a slowdown at the DOJ. Cases have declined from 63 in fy 2000 to 44 in fy 2001 to only 27 this year. Whether this reflects changed priorities or a natural falling off after a highly successful drive against international cartels (i.e., the low-hanging fruit have been picked), deserves examination. The DOJ reports that there are currently 99 grand juries at work, which suggests that the number of prosecutions will be picking up substantially.

A highlight in the current Administration has been the conviction and sentencing of Alfred Taubman for his participation in price fixing in the auction house industry. At a time when attention is being paid to corporate leaders whose greed has caused so much pain and anxiety in our economy, this example of prosecution deserves more attention than it has received.

The extraordinary success of the DOJ's amnesty program has influenced the European Union to develop a program that is similar in many ways, so that incentives for cartel-busters in both the U.S. and Europe are now consistent.

Issues of Style and Management

The Administration has utilized a rhetoric that has emphasized continuity and moderation. This stands in contrast to the rhetoric of the Reagan Administration and

represents an important and positive aspect of this Bush Administration's antitrust policy. Moreover, this Administration has requested budgets that reflect the rhetoric. Their first budget called for increases for both agencies. The second one, currently before Congress, called for financial increases that would maintain the existing level of personnel (the critical factor in antitrust enforcement, second only to motivation and direction). While it appears that the agencies may not receive enough to maintain current staff levels, the AAI has supported the Administration's budget requests as reasonable within the overall limitations of the times and recognizing that the peak of the merger wave has apparently passed. For reasons set out in our letter on behalf of leading consumer organizations, we hope the Congress will appropriate and authorize funding sufficient to maintain current personnel levels.[8] Thought will need to be given on how to unhook funding from H-S-R fees, which are an uncertain source of revenue.

Perhaps the principal management problem thus far has been the failed effort of the Commission and the DOJ to work out in a more formal way a number of problems that they feel stand in the way of better co-ordination of which agency will handle which investigation. Without regard to the wisdom of the clearance agreement they worked out, it would appear that there was a failure at both agencies to recognize that the changes were significant enough to warrant discussion with Congress. There may also have been a problem at the Commission in terms of the Chairman's communications with other Commissioners. Hopefully, lessons were learned in both regards. Given the amount of time and attention that went into this episode, it is gratifying to be able to observe that the clearance process now seems to be working more smoothly, even without the formal changes.

[8] http://www.antitrustinstitute.org/recent2/190.cfm.

APPENDIX: SELECTED DATA ON FEDERAL ANTITRUST ENFORCEMENT
FY 1997-2002

MERGER ENFORCEMENT

H-S-R PREMERGER NOTIFICATIONS RECEIVED

FISCAL YEAR	1997	1998	1999	2000	2001*	2002 [thru August]
TOTAL	3,702	4,728	4,632	4,926	2,376	n/a

Data from DOJ Workload Statistics (total for both agencies, since notifications go to both agencies simultaneously) (http://www.usdoj.gov/atr/public/10108.htm).
*Threshold for reporting was raised in Feb. 2001 and economic slowdown occurred.

H-S-R Investigations Opened

FTC						n/a
DOJ	220	170	172	137	106	n/a

SECOND REQUESTS, Number of Requests

FTC	45	46	45	43	n/a	n/a
DOJ	77	79	68	55	n/a	n/a

According to DOJ's work load statistics (http://www.usdoj.gov/atr/public/10108.htm), the DOJ's second request figures are:
1997: 120
1998: 102
1999: 68
2000: 55
2001: 43

SECOND REQUESTS, Percentage of Transactions Reported

FTC	1.3%	1%	1%	.9%	n/a
DOJ	2.2%	1.7%	1.6%	1.2%	n/a

Except as noted, above three items are from the joint FTC/ DOJ FY 2000 Annual Report to Congress, http://www.ftc.gov/os/2001/04/annualreport2000.pdf)

SECOND REQUESTS, Percentage Ending in Enforcement

FTC	60%	74%	67%	74%	n/a	n/a
DOJ	18%	19%	31%	38%	21%	n/a

From the Joint Report to Congress, fy 2000.

CASES FILED

FTC	27	34	30	32	23	23
DOJ	14	15	21	21	9	4

Data provided by FTC, 9-17-02, through Aug. 31.
Data for DOJ for 2000, 2001 and 2002 provided by DOJ, 9-17-02, through 9-17-02.

TOTAL MERGER INVESTIGATIONS

FTC						n/a
DOJ	277	230	230	178	148	n/a

Data from DOJ's work load statistics (http://www.usdoj.gov/atr/public/10108.htm).

DOJ Fix It-First Outcomes

DOJ	17	36	25	16	20	5

DOJ Cases Abandoned After Filing

DOJ				2	0	1

DOJ Matters Abandoned Prior to Filing in Court

DOJ				11	4	1

Data for 2000, 2001, 2002 provided by DOJ, 9-17-02, through 9-17-02

CIVIL NON-MERGER ENFORCEMENT

CIVIL NON-MERGER INVESTIGATIONS OPENED

1997	1998	1999	2000	2001	2002

FTC	36	43	44	25	56	56
DOJ	91	94	56	40	30	n/a

FTC data provided by FTC, 9-17-02, through Sept. 17.
DOJ data from DOJ Workload Statistics

NON-MERGER ENFORCEMENT ACTIONS TAKEN

FTC	4	12	5	9	3	9
DOJ	7	8	12	2	1	4

Data provided by FTC, 9-17-02, through Sept. 17
Data provided by DOJ, 9-17-02, through Sept. 17.

DOJ CRIMINAL ANTITRUST ENFORCEMENT

DOJ Criminal Antitrust Cases Filed

Fiscal Year	1997	1998	1999	2000	2001	2002
DOJ	38	62	57	63	44	27

Data provided by DOJ, 9-17-02, through Sept. 17.

DOJ Fines Imposed (hundreds of thousands of dollars)

DOJ	$204	242	960	303	271	n/a*

From public documents
*DOJ communicated that during the past 15 months, the Antitrust Division has secured almost $125 million in criminal fines, convicted 24 corporations and 25 individuals, and sentenced 25 individuals to prison terms averaging 17½ months.

BUDGETARY DATA FOR THE AGENCIES

FEDERAL TRADE COMMISSION

FY	TOTAL AGENCY		COMPETITION MISSION	
	$(M)	FTE	(M)	FTE
REQUEST 2003	$172	1074	$77	505

2002	$156	1074	$73	505
2001	$147	1049	$69	492
2000	$125	979	$59	465
1999	$117	979	$55	469

DOJ ANTITRUST DIVISION

	FY	$(M) TOTAL	FTE
REQUEST	2003	$134	851
	2002	$131	851
	2001	$121	809
	2000	$110	813
	1999	$102	834

ANTITRUST LAW

Defending Liberty
Pursuing Justice

02 AUG 7 AM 11:33 AMERICAN BAR ASSOCIATION

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August 5, 2002

Via Facsimile and U.S. Mail

Senator Herb Kohl
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Michael DeWine
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senate Judiciary Committee's Oversight Hearings

Dear Senators Kohl and DeWine:

I am writing on behalf of the Section of Antitrust Law of the American Bar Association in connection with the Committee's oversight hearings with respect to the antitrust enforcement activities of the Federal Trade Commission and the Antitrust Division of the Department of Justice. This letter addresses three subject areas: (1) progress made by the federal agencies in response to recommendations contained in the 2001 report of the Section's Task Force on the Federal Antitrust Agencies,[1] (2) the need for adequate funding for the agencies, and (3) the Section's opposition to expanding antitrust exemptions.

The views expressed herein are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the position of the Association.

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[1] *Report of the Task Force on the Federal Antitrust Agencies - 2001*, American Bar Association, Section of Antitrust Law, Task Force on the Federal Antitrust Agencies -- 2001.

1. Adoption of Section of Antitrust Law Task Force Recommendations

The Task Force on the Federal Antitrust Agencies was appointed by the Chair of the Section of Antitrust Law in the Fall of 2000, with the mission of evaluating and reporting on the state of federal enforcement of the antitrust laws of the United States, with the view that the resulting report would be of use to the new Administration, whichever political party might be in power. In its 2001 report, the Task Force offered the new Administration a number of recommendations that it felt, if followed, would significantly advance the cause of competition policy in the United States and around the world. The recommendations included giving immediate review to the relationship between antitrust law and policy and intellectual property law and policy, making global competition initiatives a high priority, evaluating the merger review process, and reviewing the agencies' operations and organizations to improve staff-private party interaction. We are pleased that the Administration has acted on these recommendations.[2]

a. Reviewing the Relationship Between Antitrust Law and Policy and Intellectual Property Law and Policy

The Section's Task Force report urged the new leadership of the antitrust agencies to encourage examination of and debate about the relationship between antitrust law and policy and intellectual property law and policy. In response, the FTC and the Antitrust Division are conducting public hearings to develop a better understanding of how to analyze the issues that arise at the intersection of these two areas. In addition, the FTC has established a Noerr-Pennington Task Force which has considered misuse of antitrust immunity by patent holders in the pharmaceutical industry.[3]

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[2] The Section's Task Force report also recommended that the Administration appoint experienced leaders of the Antitrust Division and the FTC who are committed to positive change. The Section believes the Administration has followed this recommendation by appointing highly qualified persons to fill leadership positions in both agencies.

[3] *See* the written testimony of Timothy J. Muris, Chairman of the FTC, before the Committee on Commerce, Science, and Transportation, United States Senate, April 23, 2002. The *Noerr-Pennington* doctrine provides antitrust immunity for individuals petitioning the government. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight,*

In 1995, the enforcement agencies recognized the complementary nature of antitrust and intellectual property in their "Antitrust Guidelines for the Licensing of Intellectual Property." Both the FTC and the Antitrust Division have pursued enforcement actions against firms allegedly using intellectual property in attempts to obtain or extend monopoly power. The intersection of these two areas of the law presents questions about which enforcement policies the agencies will apply and how these two bodies of law can be reconciled most effectively. As Chairman Muris announced at the outset of the hearings, "[T]he hearings will consider the implications of competition and intellectual property law and policy for innovation and other aspects of consumer welfare."[4] The Section called for greater dialogue between the enforcement agencies on these issues, and the agencies have met this challenge with success, through their hosting of numerous joint public hearings including business, consumer, and government representatives.

b. International Competition Initiatives

The Section's Task Force report urged the new Administration, through the antitrust agencies, to continue the global competition initiatives already underway. It recommended that, as a priority matter, the United States work with other nations toward reducing the compliance burden, especially the cost and time delays associated with multi-jurisdictional pre-merger review. The FTC and the Antitrust Division have not only continued the global competition initiatives, but have also expanded their close working relationship with their counterparts in the European Commission (EC). Furthermore, in October 2001, the Antitrust Division and the FTC launched the International Competition Network (ICN) with top foreign antitrust officials. The ICN will provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement. Its focus will include the merger control process as it applies to multi-jurisdictional mergers and the competition advocacy role of antitrust agencies, particularly in emerging economies. The Section is willing to assist and cooperate with the antitrust enforcement agencies in working with their

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Inc., 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

[4] Press Release, FTC, Muris Announces Plans for Intellectual Property Hearings (Nov. 15, 2001) (*available at* http://www.ftc.gov/opa/2001/11/iprelease.htm).

international counterparts to bring about procedural and substantive convergence in antitrust enforcement.

Under the new Administration, the antitrust agencies have attempted to build on their relationships with the EC to achieve convergence in analytical approaches to cases of mutual concern. Although the EC and the U.S. antitrust agencies have had divergent views on issues such as the competitive effects of "bundling" products and on the application of the theories of market foreclosure, the two continue to work together through the Working Group on Mergers.[5]

c. Continued Evaluation of the Merger Review Process

The Section's Task Force report recommended that the new Administration focus on the merger review process, since it is a frequent point of contact between the business community and the enforcement agencies, and since it has a disproportionate effect on perceptions of agency behavior and performance by the general business community.

The Section's Task Force suggested an early, candid exchange of concerns that agency staff may have with the parties. To remedy past criticisms, the Antitrust Division announced the details of its Merger Review Process Initiative last October. The goals of the new process are to facilitate more efficient and more focused investigative discovery and to provide for an effective process for the evaluation of evidence. The initiative addresses the use of the initial 15 or 30 day waiting period, the issuance of Second Requests, and the post-Second Request Period.

In addition, the FTC staff has participated in a series of successful multi-city "brown bag" discussions focusing on merger investigations practices and on developing and negotiating remedies. The merger investigations workshops focused on FTC procedures during the HSR Act Second Request process for obtaining additional information and data used to assess the likely competitive effects of mergers and acquisitions. The remedies workshops have considered whether the agency's remedy provisions are necessary or sufficient and whether the process through which they are

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[5] Press Release, FTC, FTC Chairman Muris Stresses Commitment to Cooperation with European Commission (Nov. 14, 2001) (*available at* http://www.ftc.gov/opa/2001/11/euus.htm).

negotiated can be improved. Corporate personnel, outside and in-house attorneys, economists, and consumer groups have provided input on the efficiency of the merger review process, the time and expense involved in that process, the perceived stringency of the remedy requirements, and the information that parties should provide during the review process.

The Section also applauds the agencies' efforts to work out an agreement concerning clearance procedures for merger reviews and other antitrust matters. We support overhauling the clearance system between the FTC and the Antitrust Division to avoid time-consuming clearance disputes that delay initiation of investigations.[6]

d. Review of Agencies' Operations and Organizations

The Task Force suggested that the new Administration review both the structure and the actual operation priorities of both federal antitrust agencies to ensure that they are organized and operated in a way that promotes efficient and effective enforcement efforts and improves interaction with the public. Recently, the Antitrust Division was reorganized to concentrate investigatory and enforcement expertise and resources for commodities within a particular section, and thereby minimize the dispersion of enforcement efforts across sections. This effort also recognizes the emergence and importance of certain changing areas of the economy, such as information technology, telecommunications and industries characterized by network competition.

2. The Need for Adequate Funding for the Agencies

Vigorous enforcement in the United States of the antitrust laws is important for long-term economic growth, consumer well being, and the international competitiveness of American enterprises. A broad consensus exists today, not only with respect to the importance of vigorous antitrust enforcement, but also with respect to the major thrust of appropriate antitrust enforcement policies. There is also a broad consensus that traditional consumer protection problems persist and that the FTC should continue its enforcement mission in this area.

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[6] *See* Letter to Chairman Timothy J. Muris and Assistant Attorney General for Antitrust Charles A. James from Roxane C. Busey dated January 23, 2002 (available at http://www.abanet.org/antitrust/jamesmuris.doc).

The Section of Antitrust Law has long supported adequate funding for these agencies. In ranking adequate funding for the federal agencies high on its list of serious issues for the new Administration in the 2001 Task Force report, the Section pointed out that "[t]here is little point in enacting legal commands without providing the means to enforce them effectively."[7]

Two principal considerations underscore the need for adequate funding. First, there is a significant enforcement activity at the agencies -- a number of important mergers requiring review under the HSR Act, other civil non-merger investigations particularly in intellectual property and the drug and health care industries, and criminal prosecutions. Adequate funding is necessary to support these enforcement activities. Second, the agencies are engaged in activities in addition to traditional law enforcement such as holding hearings and workshops, providing business advice, conducting pertinent studies,[8] engaging in competition advocacy, enhancing training activities, and participating in international initiatives to promote the harmonization of antitrust laws and procedures. These tasks are essential elements of a sensible competition policy program. In particular, even more resources should be available for the agencies to engage in thoughtful contemplation of their past enforcement activities, including an examination of the policy bases for such activities, whether past enforcement decisions have actually produced the predicted results, and whether or not they have ultimately served the public interest.

Adequate funding of the FTC's consumer protection mission is equally important. Traditional consumer protection problems continue, even in the new economy, and the FTC's recent focus on the Internet is appropriate. Privacy, children's online access issues, and media violence are items on the FTC's agenda that require continuing attention. Protecting both business and consumer needs for safe, predictable, and healthy e-commerce without impeding the growth and development of this new medium will continue to challenge the agency and tax its resources.

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[7] *See also* Letter to Senator Hollings and Congressman Gregg from Roxane C. Busey dated April 18, 2002 (available at http://www.abanet.org/antitrust/congressltr.pdf).

[8] *See, e.g.,* Press Release, FTC, "A Study of the Commission's Divestiture Process" evaluating 35 divestiture orders entered between 1990 and 1994 (available at http://www.ftc.gov/opa/1999/9908/divestreport.htm).

It is widely believed in the antitrust community that some unknown numbers of matters do not get proper attention from the agencies because of limited resources. This is true where there are statutory deadlines, as in the review of mergers subject to HSR Act reporting requirements, but it is most obvious in areas where there are no such deadlines, as in non-merger civil investigations and business review letters. Adequate funding will help to ensure that the agencies will have the resources they may need to respond to the many challenges of antitrust and consumer protection enforcement in this era of increasing globalization and rapid technological advance -- efficiently, fairly, effectively, and in a way that benefits consumers.

3. Opposition to Antitrust Exemptions

Finally, the Section of Antitrust Law would like to take this opportunity to note its concern over increasingly frequent attempts to secure Congressional exemption of conduct from the antitrust laws. The Section strongly believes that the courts and antitrust enforcement agencies are best at protecting our economy from antitrust violations when not constrained by ill-advised antitrust exemptions which threaten competition.

The Section has consistently expressed its opinion generally disfavoring antitrust exemptions directed at specific industry categories or conduct.[9] The antitrust laws are designed to provide general standards of conduct for the operation of our free enterprise system. Special exemptions from these standards are rarely justified.

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[9] *See, e.g.*, Reports of the ABA Section of Antitrust Law on the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1997, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1997, and the Major League Baseball Antitrust Reform Act of 1995 (all available at http://www.abanet.org/antitrust). Other, similar reports on analogous legislation may be obtained through inquiry to the Section of Antitrust Law. Such reports include the Reports of the Antitrust Section on the Malt Beverage Interbrand Competition Act of 1985, the proposed modification of McCarran-Ferguson Act in 1989, and the Petroleum Pricing Legislation of 1992.

With very few exceptions, the courts determine when an alleged restraint is unreasonably restrictive of competition by applying the "rule of reason."[10] Under this standard, a court will evaluate the impact of a challenged agreement upon competitive conditions in a properly defined relevant market, weighing the anticompetitive harms against the procompetitive benefits of an arrangement.[11] The rule involves an extended inquiry into the competitive effects of the conduct at issue, and affords firms ample opportunity to demonstrate that their cooperative activities do not unreasonably restrain competition. The rule of reason approach allows the courts to resolve similar cases consistently, regardless of the industry in which they arise. The standard is also flexible over time, allowing the courts to judge practices under the specific facts and circumstances presented. By contrast, a legislative exemption created at a specific point in time may become inappropriate as time passes and the market evolves.[12]

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[10] *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). A very limited set of restraints are treated as "*per se*" unlawful -- that is, unlawful without regard to their effects. *See, e.g., Palmer v. BRG of GA., Inc.,* 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972). Price fixing is a classic example of a *per se* unlawful activity, but even price fixing may be lawful where it is undertaken pursuant to a joint venture or other arrangement that brings a new product to market that would not otherwise exists. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *Northern Pacific Railway v. United States,* 356 U.S. 1, 5 (1958).

[11] *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and purpose or end sought to be attained, are all relevant facts.").

[12] With respect to the insurance industry, for example, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, in 1945, at a time when the industry was dominated by strong cartels. The industry became less concentrated over time, but the exemption and regulation persisted.

Exemptions from the antitrust laws generally are undesirable because the antitrust laws reflect our fundamental national economic policy favoring free competition.[13] In light of the flexibility of the antitrust laws, exemptions are very seldom necessary to achieve any legitimate purpose. Only in the rare instances where antitrust regulation causes undesirable results or prevents plausible efficiencies are exemptions justified. Indeed, even where exemptions might be hoped to promote legitimate goals, experience has demonstrated that they seldom do so. Antitrust exemptions seldom achieve any legitimate purpose and often impose real costs upon consumers and the nation as a whole. Experience has shown that granting an exemption not only reduces consumer welfare; it also frequently fails to help the industry that is seeking the protection.[14]

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[13] *See, e.g., FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973)("[A]ntitrust exemptions are disfavored"); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956). Similarly, any form of "[i]mplied antitrust immunity is not favored." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378, 388 (1981). *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.") (footnotes omitted). *See also United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975); *Gordon v. New York Stock Exchange* 422 U.S. 659, 682 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) ("When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws"); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary"); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 126 (1973); *Carnation Co. v. Pacific Westbound Conference et al.*, 383 U.S. 213, 217-18 (1966); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *California v. FPC,* 369 U.S. 482 (1962); *United States v. Borden Co.*, 308 U.S. 188 (1939).

[14] For an extensive discussion of the benefits of competition and the costs associated with regulation designed to replace competition, *see* Report on Regulatory Reform, Industry Regulation Committee, Section of Antitrust, American Bar Association, 54 Antitrust L. J. 503 (1985). *See also* Section of Antitrust Law, American

In addition to imposing costs on consumers and society, antitrust exemptions often burden national policy by undermining free trade goals. At a time when our nation is working to promote free trade and the harmonization of competition laws, creating or maintaining special preferences for particular industries cuts against that goal. Studies of the antitrust exemption for export cartels frequently have criticized the exemption on the grounds that it makes the task of the United States more difficult when it presses foreign nations to curtail the activities of their own authorized export cartels.[15]

4. Conclusion

The Section of Antitrust Law commends the agencies for responding to many of the Section's Task Force recommendations, and it supports adequate funding for the FTC and the Antitrust Division. The Section also hopes the Committee will find its views on antitrust exemptions helpful in its oversight responsibilities.

I hope you will let me know if you have questions, or if the Section of Antitrust Law can provide any other input into the oversight process.

Sincerely,

Roxane C. Busey

Roxane C. Busey
Chair, Section of Antitrust Law
2001-02

Bar Association, Regulated Industries, Antitrust Law Developments 1245–1431 (5th ed. 2002).

[15] The exemption is codified at 15 U.S.C. §§61-65, and was studied by the Federal Trade Commission and the Organization for Economic Cooperation and Development. *See* Federal Trade Commission, WEBB-POMERENE ASSOCIATIONS: A 50 Year Review (1967); Organization for Economic Cooperation and Development, Export Cartels (1974). The studies also criticized the exemption on the grounds that an item may serve as a vehicle for conspiracies directed at the domestic market.

cc: Assistant Attorney General Charles James
Chairman Timothy J. Muris
Commissioner Sheila F. Anthony
Commissioner Mozelle W. Thompson
Commissioner Orson Swindle
Commissioner Thomas B. Leary

CH01/12236549.2

Broadband Service Providers Association (BSPA)
Comments Submitted to:
Senate Judiciary Committee
Subcommittee on Antitrust

September 18, 2002

The BSPA requests that the Senate Judiciary Committee provide its support and endorsement for the full investigation of anti-competitive predatory pricing conducted by Comcast, Charter, Time Warner, Adelphia and other major incumbent MSO's during the past year. Preliminary documentation is already being reviewed at the Department of Justice. This documentation provides enough evidence to warrant the opening of a formal investigation.

The BSPA and its members first discussed their growing concern over predatory pricing as part of BSPA's initial comments and testimony regarding the AT&T Comcast Merger. BSPA also discussed these concerns as part of testimony by Wide Open West's Mark Haverkate before the Senate Judiciary Committee on April 3, 2002. (Text attached) Incumbent cable operators initially denied that they ever employed such practices. When confronted with documentation that proved the activity occurred, incumbent cable operators responded that such conduct was a fully justified and normal due to intense competition.

The market behavior of incumbents did not change and in some regards became more geographically spread and intense. The BSPA again presented its position as part of comments filed with the FCC regarding the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Docket 02-145, and stated:

> ***"1. By Engaging in Secret and Discriminatory Predatory Pricing, Incumbent Cable Operators Undermine Competitive Entry***
>
> *BSPA members, as well as consumers, have been the victims of the anticompetitive pricing practices of incumbent cable operators. While the Commission and consumers certainly should welcome reduced prices in response to competitive entry, the level of these price cuts in certain cases is indicative of a predatory strategy designed to drive new entrants from the market. Given these significant concerns, BSPA urges the Commission to support efforts by the Department of Justice ("DOJ") to investigate and put an end to this unlawful conduct.*
>
> *One fact is clear: Incumbent cable operators have reacted to competitive entry in a number of cases with startlingly large rate cuts and/or other special offers. These have included, for example, a 50 percent rate reduction in Kansas City, a 50 percent reduction in Arcadia and Monrovia, California followed by additional offers of every third month free, 33 percent rate reductions in Texas, and churn incentives in Alabama including $300 cash payments and the forgiving of past-due bills. To the extent that the resulting*

prices are below the incumbent cable operators' average or marginal variable cost, such offerings are clearly predatory attempts by well-funded monopolists to force BSPA members out of local markets.[1]"

The aggressive denial response from Comcast in its reply comments was expected. They stated the following in their reply comments in Docket 02-145 filed on August 30, 2002 with the FCC.

- *"Claims about secret and discriminatory predatory pricing by cable paint an ominous portrait, while the facts suggest precisely the kinds of competitive responses that policy makers should expect, and desire, in a competitive market for an unregulated service.*
    - *Comcast is aware of no evidence that a single cable operator has priced its service below its average or marginal costs. If BSPA is aware of any such evidence, it has had ample opportunity to produce it, and its failure to do so speaks volumes. Given that Comcast – and, as far as it knows, other cable operators – typically meets rather than beats overbuilders' prices, it is improbable that any such evidence exists."*

Faced with these continued denials and continued market behavior, the BSPA and other competitors concluded that the best way to determine the truth was to request that the Antitrust Division of the Justice Department open a formal investigation. While Comcast wants everyone to believe that no evidence exists, the first documentation and request for Department of Justice action was sent to the Department on April 26, 2002. Additional data and evidence has been filed since that first request for action. A copy of this initial material has been provided to Staff Members of the Judiciary Committee so that they could review the initial data and validate the authenticity of opening a formal investigation.

No group of companies is more committed to open competition than the members of the BSPA, which represents the embodiment of competition and market development envisioned by the 1996 Telecom Act. For several years the misconception persisted that competitive broadband service providers were going to die a natural death. That vision has not come true for the remaining members.

Current economics and market conditions have caused several original members to cease operations. These same conditions have caused all members to dramatically scale back growth and investment plans when the continued expansion of BSP operations would advance the National goal of competitive, facilities-based broadband networks.

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[1] To the extent that these offerings remain above average or marginal variable cost, they are evidence that *current* incumbent cable operator pricing is drastically excessive and that incumbent cable operators continue to exercise significant monopoly power, despite their claims to the contrary concerning direct broadcast satellite ("DBS").

Comcast cites types of competition that it faces in its comments to the FCC and asserts that competition is increasing. Comcast also references its own investment profile and progress in providing expanded services to its customer base. It also accurately cites the impact of BSP competition as one of the factors that causes Comcast to make these investments. Comcast goes on to state that "... new over builders are making the competition fiercer than ever, driving cable operators to invest and innovate, just as DBS has done."

BSP competition is actually more threatening and has greater potential market impact than DBS. As such, BSP competition is the one segment of the communications industry that incumbents would most like to see disappear. The current profile of BSP members is still limited in scope when compared to the market power of incumbents, but a comparison of the numbers referenced in the Comcast filings is very useful.

	Comcast (Current: Before Merger)	BSPA
Homes Passed With Service	14.04 M	4.0 M
Cable TV Customers	8.5 M	1.0 M
Cable Penetration Rate	60.5%	25.0%
Digital Customers	1.98 M	Not published
Digital Penetration	23.3%	40-60%
Internet Customers	1.17 M	.56 M
Internet Penetration Rate	13.7 %	56.0%
Telephone Customers	Limited?	.46 M
Telephone Penetration Rate	Limited?	46%

The profile of BSPA service penetration rates is closer to historical forecasts and the desired long-term vision for a fully developed competitive multi-service market than is Comcast's operation. These service penetration rates are in addition to services sold by other providers. Many people assert that the expected demand for high speed Internet and digital services has not occurred and therefore does not exist. Since the demand has been met, new service providers are not needed. At least where BSPA members offer service, this is not accurate.

The initial success of BSP competition in some markets is a demonstration that the demand is there and has not been fully met by other types of competition. The BSPA applauds Senators Kohl and DeWine for their initiative to direct the GAO to conduct a Market Study to assess the full impact of BSP competition as compared to communities where this type of competition does not exist. The BSPA requests that this study receive priority so that these important market data and perspective can be available as background for next year's legislative session.

Recognizing BSP competition as the real effective long-term threat, incumbent cable operators have mounted their recent campaigns to stop BSP growth and eliminate this type of competition before it reaches any more markets or potential customers. The

BSPA believes that recent activities are predatory and should therefore be fully and fairly evaluated for that inappropriate, illegal conduct. The BSPA therefore requests that the Senate Judiciary Committee offer its support for the opening of this investigation.

Prepared Statement of the Federal Trade Commission

Before the

Committee on the Judiciary
Subcommittee on Antitrust, Competition, and Business and Consumer Rights
United States Senate

Concerning

An Overview of Federal Trade Commission Antitrust Activities

September 19, 2002

Mr. Chairman and Members of the Subcommittee, I am pleased to appear before you to present testimony of the Federal Trade Commission discussing an overview of our antitrust enforcement activities.[1] The actions and initiatives I will discuss today are the product of, and a testament to, a professional, highly-qualified, and dedicated staff. Their work has made the FTC the well-respected agency that it is today.

I.

Introduction

By enforcing the antitrust laws, the Federal Trade Commission helps ensure that markets operate freely and efficiently. Aggressive competition promotes lower prices, higher quality, and greater innovation. The work of the FTC is critical in protecting and strengthening free and open markets in the United States.

The FTC's record is impressive. The agency has fulfilled its mission of protecting American consumers by pursuing an aggressive law enforcement program during rapid changes in the marketplace – the past decade saw the largest merger wave in history, the rapid growth of technology, and the increasing globalization of the economy. Through the efforts of a dedicated and professional staff, the FTC has shouldered an increasing workload despite only modest increases in resources.

The guiding word at the Commission is "continuity." The agency continues aggressively to pursue law enforcement initiatives, launch consumer and business education campaigns, and organize forums to study and understand the changing marketplace, just as we have done for several years. Our competition mission continues to reflect the following widely-shared consensus: (1) the purpose of antitrust is to protect consumers; (2) the mainstays of antitrust enforcement are horizontal cases – cases involving the business relations and activities of competitors; (3) in light of recent judicial decisions and economic learning, appropriate monopolization and vertical cases are an important part of the antitrust agenda; and (4) case selection should be guided by sound economic and legal analysis, and made with careful attention to the facts.

The FTC is primarily a law enforcement agency, and we will continue aggressive enforcement of the antitrust laws within the agency's jurisdiction. The Commission also has a broader role as a deliberative body and independent expert on issues affecting the market. Thus, the Commission is well-suited to studying an evolving marketplace and developing antitrust policy. In this role, we continue to hold public hearings, conduct studies, and issue reports to Congress and the public.

Our activities of the past year illustrate how this broad role promotes competition. The Commission's testimony today will highlight three main goals and achievements: (1) building on the agency's recent history of aggressive law enforcement; (2) focusing on industries and issues significant to consumers, such as energy, health care, and matters derived from the new

economy, including intellectual property rights; and (3) continuing to use the FTC's special role as an expert agency to advance the state of knowledge about particular issues central to our mission. In accomplishing these goals, there is a high degree of unity among the five Commissioners. In fact, there is near unanimity in voting patterns, particularly with respect to votes concerning law enforcement matters. The near unanimity of voting patterns reflects both a broad consensus among the Commissioners about the types of cases the Commission should pursue, and the careful and deliberate process by which the Commissioners consider matters, consulting with the staff to address the issues and concerns of individual Commissioners.

II.

An Overview of The FTC's Antitrust Enforcement Activities

A. Anticompetitive Mergers. Merger enforcement continues to be a staple of the Commission's enforcement agenda. Stopping mergers that substantially may lessen competition ensures that consumers pay lower prices and have greater choice in their selections of goods and services than they otherwise would. The level of merger activity in the marketplace, along with other factors, affects the FTC's merger workload. During the 1990s, record-setting levels of mergers, both in numbers and in size, required extraordinary efforts by the FTC staff to manage the necessary reviews within statutory time requirements. Recent economic conditions have reduced merger activity, and amendments to the Hart-Scott-Rodino Act[2] have cut the number of proposed mergers reported to the government. Even so, Commission merger enforcement remains a significant challenge for the following reasons:

- **The size, scope, and complexity of mergers have increased.** The number of mergers still remains relatively high by historic standards, and mergers also continue to grow in size, scope, and complexity. The dollar value of last year's reported mergers was about 82 percent higher, in nominal terms, than the 1995 total, even without any adjustment for the different filing thresholds. In fact, the $1 trillion total in 2001 exceeded the average annual total dollar value of reported transactions during the booming 1991-2000 decade. The size of mergers affects the FTC's workload because mergers among large diversified firms are likely to involve more products than mergers among smaller firms, and thus generally involve more markets requiring antitrust investigation. In addition, larger firms are more likely to be significant players in the markets in which they compete, which increases the need for antitrust review. Finally, as new technologies continue to grow and as the economy becomes more knowledge-based, the resulting complexity of many mergers requires more extensive inquiry.

- **Large numbers of mergers still require scrutiny.** The number of proposed mergers raising competitive concerns remains significant. Despite fewer reported transactions, the Commission's level of enforcement activity remains at a high level. Through the first eight months of this year, for example, we opened over 100 merger investigations and issued 24 requests for additional information under the HSR Act ("Second Requests"), numbers only slightly below those during the peak merger wave years 1996 through 2000. Thus far in FY

2002, the Commission has taken enforcement action in 23 mergers. Thus, despite a reduction in the number of HSR reported transactions, our merger enforcement workload remains high because the workload derives mostly from the number of transactions raising antitrust concerns, not from the overall number of filings.

- **Non-reportable mergers now require greater attention.** Although fewer proposed mergers remain subject to the reporting requirements of the HSR Act, the standard of legality under Section 7 of the Clayton Act remains unchanged.[3] Consequently, we need to identify (through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies) those unreported, usually consummated, mergers that could harm consumers. So far this fiscal year, the Commission has challenged two non-reportable mergers.[4] In August, the Commission announced a settlement regarding these two mergers.[5]

- **Resource-intensive litigation is more frequently needed.** While the Commission resolves most merger challenges through settlement, it is sometimes necessary to litigate, particularly when the merger at issue already has been consummated. Merger litigation requires enormous resources. At the height of preparation, a single merger case requires the full-time attention of numerous staff members – not only lawyers, but also economists, paralegals, and support staff. To counter arguments and evidence presented by merging parties, these cases also require analysis and testimony by outside experts with specialized knowledge, which can be extremely costly. Since the fiscal year began, the Commission has filed two administrative actions,[6] and has authorized federal court challenges to five proposed mergers involving products including rum,[7] food service glassware,[8] pigskin and beef hide gelatin,[9] telescopes,[10] and cervical cancer screening products.[11]

B. Streamlining Merger Review. The FTC has been working with the Antitrust Division of the U.S. Department of Justice (DOJ) to establish procedures to make the HSR merger review process more efficient and transparent. The FTC has focused on several areas, including:

- **Electronic Premerger Filing.** As part of an overall movement to make government more accessible electronically, the FTC, working with the DOJ, will accelerate its efforts in FY 2003 to develop an electronic system for filing HSR premerger notifications. E-filing will reduce filing burdens for businesses and government and create a valuable database of information on merger transactions to inform future policy deliberations.

- **Burden Reduction in Investigations.** The agencies have taken steps to reduce the burden on merging parties in document productions responsive to Second Requests. In response to legislation amending the HSR Act, the Commission amended its rules of practice to incorporate new procedures. The amended rules require Bureau of Competition staff to schedule conferences to discuss the scope of a Second Request with the parties and also establish a procedure for the General Counsel to review the request and promptly resolve any remaining

issues. Measures adopted include a process for seeking modifications or clarifications of Second Requests, and expedited senior-level internal review of disagreements between merging parties and agency staff; streamlined internal procedures to eliminate unnecessary burdens and undue delays; and implementation of a systematic management status check on the progress of negotiations on Second Request modifications.

- **Merger Investigation Best Practices.** The FTC is conducting a series of national public workshops regarding modifications and improvements to the merger investigation process. The FTC will solicit input from a broad range of interest groups, including corporate personnel, outside and in-house attorneys, economists, and consumer groups, on topics such as using more voluntary information submissions before issuance of a Second Request, reducing the scope and content of the Second Request, negotiating modifications to the Second Request, and focusing on special issues concerning electronic records and accounting or financial data.[12]

- **Merger Remedies.** Other "best practices" workshops will solicit comments on merger remedies. Among the issues to be addressed are structuring asset packages for divestitures, timing of divestitures (*i.e.*, up-front or after consummation), evaluating the competitive adequacy of proposed buyers, and assessing the preservation of competition after divestitures.[13]

C. Non-merger Enforcement. There is broad consensus that non-merger enforcement policy should focus primarily on horizontal agreements between or among competitors. While merger activity remains relatively high, a decline from the unprecedented levels of recent years has allowed us to restore resources to non-merger enforcement, consistent with historical allocations between merger and non-merger programs. In fiscal year 2001, the FTC opened 56 non-merger investigations, more than double the number begun in the previous fiscal year. We have opened an additional 51 investigations during this fiscal year. The Commission presently has three non-merger matters in Part III litigation,[14] and has obtained consent orders stopping anticompetitive practices in an additional 10 matters, most involving health care.[15]

D. Focus in the Areas of Energy, Health Care and Intellectual Property. Because of their great importance to consumers, the Commission gives special attention to the energy and health care industries, as well as antitrust issues related to intellectual property rights.

1. ***Energy.*** Energy is vital to the entire economy and represents a significant portion of total U.S. economic output. The FTC has focused considerable resources on energy issues, including conducting in-depth studies of evolving energy markets and investigating numerous oil company mergers.

- **Oil Merger Investigations.** In recent years, the FTC has investigated numerous oil mergers. Last year, the agency reviewed four large oil mergers and analyzed competitive effects in a host of individual product/geographic market combinations. When necessary, the

agency has insisted on remedial divestitures to cure potential harm to competition. In Chevron/Texaco, the Commission accepted a consent agreement that allowed the proposed $45 billion merger to proceed but required substantial divestitures to cure the possible anticompetitive aspects of the transaction in 10 separate relevant product markets and 15 sections of the country comprised of dozens of smaller relevant geographic markets.[16] In Valero/Ultramar, the Commission obtained a settlement requiring Valero to divest a refinery, bulk gasoline supply contracts, and 70 retail service stations to preserve competition.[17] In Phillips/Conoco, the Commission has accepted for public comment a proposed consent order that will, if made final, require the merged company to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.[18] In Phillips/Tosco, applying the same standards, the Commission concluded that the transaction likely did not pose a threat to competition and voted unanimously to close the investigation.[19]

- **Study of Refined Petroleum Prices.** Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of the recent volatility in refined petroleum product prices. During an initial public conference held in August 2001, participants identified key factors, including increased dependency on foreign crude sources, changes in industry business practices, restructuring of the industry through mergers and joint ventures, and new governmental regulations. This information assisted the agency in setting the agenda for a second public conference in May 2002. The information gathered through these public conferences will form the basis for a report to be issued later this year.

- **Gasoline Price Monitoring.** The FTC also recently announced a project to monitor wholesale and retail prices of gasoline. FTC staff will inspect wholesale gasoline prices for 20 U.S. cities and retail gasoline prices for 360 cities. Anomalies in the data will prompt further inquiries and likely will alert the agency to the possibility of anticompetitive conduct in certain parts of the country. It also will increase our understanding of the factors affecting gasoline prices.

2. ***Anticompetitive Health Care Practices.*** During the past year, the FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality.

- **Antitrust Investigations Involving Pharmaceutical Companies.** The growing cost of prescription drugs is a significant concern for patients, employers, and government. Drug expenditures doubled between 1995 and 2000.[20] In response, the FTC dramatically has increased its attention to pharmaceutical-related matters in both merger and non-merger investigations. The agency now focuses one-quarter of all competition mission resources on this industry. We also have opened increasingly more pharmaceutical-related investigations. In 1996, less than 5 percent of new competition investigations involved pharmaceuticals, while in 2001, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

- **Mergers Affecting the Pharmaceutical Industry.** Last year, the Commission took action to restore competition in the market for integrated drug information databases in a novel case involving violations of both Sections 7 and 7A of the Clayton Act. This case marked the first time the Commission sought disgorgement of profits as a remedy in a merger case. The case resulted from the 1998 acquisition by Hearst Corporation of the Medi-Span integrated drug information database business. Pharmacies, hospitals, doctors, and third-party payors rely on such databases for information about drug prices, drug effects, drug interactions, and eligibility for reimbursement under various payment plans. At the time of the acquisition, Hearst already owned First DataBank, Medi-Span's only competitor. The Commission alleged that the acquisition created a monopoly in the sale of integrated drug information databases, causing prices to increase substantially to all database customers.[21] We negotiated a settlement requiring Hearst to divest the Medi-Span database and to disgorge $19 million in illegal profits, which will be distributed to injured consumers.[22]

- **Pharmaceutical Firms' Efforts to Thwart Competition from Generic Drugs.** In its non-merger enforcement cases, the FTC has focused on efforts by branded drug manufacturers to slow or stop competition from lower-cost generic drugs. While patent protection for newly developed drugs sometimes limits the role of competition in this industry, competition from generic equivalents of drugs with expired patents is highly significant. The Congressional Budget Office reports that consumers saved $8 to 10 billion in 1994 alone by buying generic versions of branded pharmaceuticals.[23] The first generic competitor typically enters the market at a significantly lower price than its branded counterpart, and gains substantial share from the branded product. Subsequent generic entrants typically bring prices down even further.[24] Anticompetitive "gaming" of certain provisions of the Hatch-Waxman Act[25] to forestall generic entry has been a major focus of Commission enforcement actions. FTC Hatch-Waxman abuse cases have fallen into three categories:

  (a) **Agreements Not to Compete.** The first category involves agreements between manufacturers of brand-name drugs and manufacturers of generics in which the generic firm allegedly is paid not to compete. The Commission has settled three such cases, including a recent settlement with American Home Products (AHP). That settlement resolved charges that AHP entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars. An AHP generic would have competed with Schering's branded K-Dur 20, used to treat low potassium conditions, which can lead to cardiac problems.[26]

  (b) **Fraudulent "Orange Book" Listings.** The second category deals with unilateral conduct by branded manufacturers to delay generic entry. Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book." Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide

notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Certain branded manufacturers have attempted to "game" this regulatory structure by listing patents in the Orange Book improperly. Such a strategy permits the company to abuse the Hatch-Waxman's stay provision to block generic competition without advancing any of the Act's procompetitive objectives. This spring, the Commission filed an action against Biovail Corporation (Biovail) alleging that it had illegally acquired a license to a patent and engaged in an anticompetitive patent listing strategy with respect to its high blood pressure drug, Tiazac. The matter was resolved through a consent order, which requires Biovail to: (1) transfer certain rights in the acquired patent back to their original owner; (2) terminate its infringement suit against the generic competitor, thereby ending the 30-month stay; (3) refrain from any action that would trigger another 30-month stay; (4) refrain from future improper Orange Book listing practices; and (5) provide the FTC with prior notice of future acquisitions of any patents it intends to list in the Orange Book.[27]

In January, the FTC also filed an *amicus* brief in pivotal private litigation involving allegations of fraudulent Orange Book listing practices.[28] *In re Buspirone* – which is the subject of continuing litigation – involves allegations that Bristol-Myers Squibb Co. (BMS) violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the FDA's Orange Book, thereby foreclosing generic competition. BMS argued that the conduct in question was covered by the *Noerr-Pennington* doctrine – a legal rule providing antitrust immunity for conduct that constitutes "petitioning" of a governmental authority. In its *amicus* brief opposing *Noerr* immunity, the Commission argued that submitting patent information for listing in the Orange Book did not constitute "petitioning" the FDA and that, even if it did, various exceptions to *Noerr* immunity applied. The district court subsequently issued an order denying *Noerr* immunity and adopting much of the Commission's reasoning.[29] The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff still must prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from antitrust scrutiny.

(c) **Agreements Between Generic Manufacturers.** The third category of cases involves agreements among manufacturers of generic drugs. In our recent complaint against Biovail and Elan Corporation, plc (Elan), the Commission alleged that the companies violated the FTC Act by entering into an agreement that provided substantial incentives not to compete in the market for the 30 mg and 60 mg dosage forms of generic Adalat CC. Biovail and Elan are the only companies with FDA approval to manufacture and sell 30 mg and 60 mg generic

Adalat products. In October 1999, Biovail and Elan entered into an agreement involving both companies' generic Adalat products. Under their agreement, in exchange for specified payments, Elan would appoint Biovail as the exclusive distributor of Elan's 30 mg and 60 mg generic Adalat products and allow Biovail to profit from the sale of both products. Our complaint alleged that the companies' agreement substantially reduced their incentives to introduce competing 30 mg and 60 mg generic Adalat products. The proposed order, which has a ten-year term, remedies the companies' alleged anticompetitive conduct by requiring them to terminate the agreement and barring them from engaging in similar conduct in the future.[30]

- **Antitrust Investigations Involving Health Care Providers.** So far this year, the agency has reached settlements with five groups of physicians for allegedly engaging in collusive practices that drove up consumers' costs. In August, the Commission announced settlements with a Dallas-Fort Worth-area physicians group and Denver-area physician practice groups and their agent.[31] The Commission alleged that the Dallas-Fort Worth group of more than 1,200 physicians entered into agreements to fix fees and to refuse to deal with health plans except on collectively agreed-upon terms. The Commission alleged that the Denver-area physician groups (comprised of more that 80 physicians) used their agent to enter into similar agreements to fix fees and to refuse to deal with payors except on collectively agreed-upon terms. These settlements were patterned after settlements that the Commission announced in May with two other Denver-area physician organizations.[32] Earlier this year, the Commission also settled charges that a group of Napa County, California, obstetricians and gynecologists agreed to fix fees and other terms of dealing with health plans and refused to deal with health plans except on collectively determined terms. To resolve the matter, the physicians agreed to refrain from engaging in similar conduct in the future, and to dissolve the organization through which they conducted their allegedly anticompetitive activity.[33] The Commission's proposed and final orders put a stop to further anticompetitive collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

- **Generic Drug Study.** In July, the Commission released an industry-wide study focused on certain aspects of generic drug competition under the Hatch-Waxman Amendments.[34] The study examined whether the Commission's enforcement actions against alleged anticompetitive agreements, which relied on certain Hatch-Waxman provisions, were isolated examples or representative of conduct frequently undertaken by pharmaceutical companies. The study also examined more broadly how the process that Hatch-Waxman established to permit generic entry prior to expiration of a brand-name drug product's patents has worked between 1992 and 2000.[35]

- **Workshop on Health Care and Competition Law and Policy.** On September 9 and 10, 2002, the Commission held a public workshop focusing on the impact of competition law and policy on the cost, quality, and availability of health care, and the incentives for innovation in

the field. Given the significance of health care spending in the United States, it is important that competition law and policy support and encourage efficient delivery of health care products and services. Competition law and policy also should encourage innovation in the form of new and improved drugs, treatments, and delivery options. Developing and implementing competition policy for health care raises complex and sensitive issues. The goal of this workshop was to promote dialogue, learning, and consensus building among all interested parties (including, but not limited to, the business, consumer, government, legal, provider, insurer, and health policy/health services/health economics communities).

3. ***Matters Involving the High-Tech Industry and Intellectual Property Rights.*** The continuing development of "high-tech" industries and the significance of intellectual property rights influence our antitrust agenda. The U.S. economy is more knowledge-based than ever. While the fundamental principles of antitrust do not differ when applied to high-tech industries, or other industries in which patents or other intellectual property are highly significant, the issues are often more complex, take more time to resolve, and require different kinds of expertise. To address these needs, we now have patent lawyers on staff, and we sometimes hire technical consultants in areas such as electrical engineering or pharmacology.

- **Standards Setting.** As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process*, which involves competitors' meeting to set product specifications, can be an area for antitrust concern. In a complaint filed in June, the Commission has charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose – in violation of the organization's rules – that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.[36] The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The Commission's complaint alleges that once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents, all of which would be passed on to consumers through increased prices for the downstream products.[37] Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech markets, the Commission will continue to pursue investigations in this important area.[38]

- **Intellectual Property Hearings.** In February 2002, the FTC and the DOJ commenced a series of hearings on *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*.[39] The hearings respond to the growth of the knowledge-based economy, the increasing role in antitrust policy of dynamic, innovation-based considerations, and the importance of managing the intersection of intellectual property and competition law to realize their common goal of promoting innovation. During the hearings, business persons, consumer advocates, inventors, practitioners, and academics have focused on:

- what economic learning reveals, and does not reveal, regarding the relationships between intellectual property and innovation, and between competition and innovation;
- "real-world" experiences with patents and competition;
- procedures and substantive criteria involved in prosecuting and litigating patent claims;
- issues raised by patent pools and cross-licensing and by certain standard-setting practices;
- the implications of unilateral refusals to deal, patent settlements, and licensing practices;
- international comparative law perspectives regarding the competition/intellectual property interface; and,
- jurisprudential issues, including the role of the Federal Circuit.

The hearings will conclude in October. A public report that incorporates the results of the hearings, as well as other research, will be prepared after the hearings.

III.

Antitrust Exemptions

A. Antitrust Exemptions

As a general matter, immunity from the antitrust laws is exceptional and disfavored.[40] That is because our nation's economy is based on the premise that competition is the best guarantor of the optimal mix of goods and services in terms of price, quality, and consumer choice. The antitrust laws, therefore, are a fundamental part of our economic system. The Supreme Court has repeated many times that the antitrust laws are "the Magna Carta of free enterprise."[41] Accordingly, there are few industries or competitive situations in which the antitrust laws do not apply. In fact, there has been a trend to deregulate industries and remove antitrust immunities rather than to create more of them.[42]

Proponents of antitrust immunity frequently claim that firms engaged in a particular industry or activity need to collaborate on matters that have special value or importance to our economy, national security, or other societal interests. They assert that compliance with the

antitrust laws will be overly burdensome for the industry, or that the fear of antitrust liability will have a chilling effect on the activity for which they seek immunity. They also frequently claim that an exemption would only sanction conduct that would not violate the antitrust laws anyway, and that an exemption would serve simply to clarify the law and reassure everyone involved in the activity. They therefore assert that the situation warrants special treatment.

We do not believe these reasons provide a sound basis for an antitrust exemption. Antitrust analysis today is highly capable of distinguishing between conduct that is unreasonable and harmful to consumers, and that which has a legitimate justification. Antitrust law, therefore, can accommodate whatever legitimate interests competitors have in collaborating with each other. Further, there are many sources of guidance that would enable firms to avoid antitrust concerns. They can look to the many case precedents on collaborative conduct, interpretive Guidelines, and antitrust counsel. Firms also can minimize uncertainty by obtaining advisory opinions from the FTC and the DOJ before engaging in the conduct for which they seek reassurance. With the assistance of antitrust counsel, companies can make well-informed judgments about whether a proposed activity will present antitrust risks. Therefore, antitrust exemptions generally are not necessary.

Moreover, unnecessary exemptions have significant potential to be harmful. First, an antitrust exemption for conduct that does not violate the antitrust laws inevitably will lead to demands for more antitrust exemptions in other, similar situations. That will gradually erode the fundamental principle that the antitrust laws constitute one of the central pillars of a competitive market economy. Second, an antitrust exemption for conduct that does not violate the antitrust laws may create an erroneous perception that such conduct actually may raise serious competitive concerns; the exemption can create confusion or uncertainty as to whether that kind of conduct is likely to violate the antitrust laws. Third, antitrust immunities that are unnecessary, imprecise, or excessively broad may enable firms to engage in collusive arrangements detrimental to consumers. An exemption can provide a pretextual reason for parties inappropriately to discuss and collaborate on non-exempt matters.[43] Such conduct is difficult to detect and prosecute, and can hinder, rather than facilitate, the important economic and security contributions that it was hoped the particular industry would make. Therefore, we believe that, in general, selective antitrust exemptions are unwise, as well as unnecessary.[44]

B. Examination of State Action and Noerr-Pennington Case Law

Certain conduct that otherwise would violate the antitrust laws is exempt from antitrust challenge. For example, the state action doctrine – first articulated in *Parker v. Brown*[45] – provides immunity for the regulatory conduct of state governments. Likewise, the *Noerr-Pennington* doctrine – first articulated in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*[46] and *United Mine Workers of America v. Pennington*[47] – provides immunity for private parties' efforts to "petition" the government. Understanding the proper scope of these exemptions – consistent with, but not broader than, their underlying policy rationales – has important consequences for consumers. Antitrust enforcers should identify and prevent anticompetitive

conduct that may resemble, but does not constitute, protected activity. When the governing standard is unclear, however, enforcement (and deterrence) can be problematic. Thus, for example, the American Bar Association Antitrust Section's 2001 report on antitrust policy recommended a reexamination of the scope of the state action exemption.[48]

It is sound antitrust policy to seek to limit the state action and *Noerr* antitrust immunities to situations that fulfill their underlying purposes. When properly applied, both of those immunities serve important Constitutional interests. State action immunity is grounded in principles of federalism and is intended to prevent antitrust enforcement from interfering with legitimate state regulatory activities. *Noerr* immunity, on the other hand, is grounded in First Amendment principles and is intended to protect a citizen's right to petition the government for the redress of grievances.

New Task Forces at the FTC are examining both the state action and *Noerr-Pennington* exemptions. Both Task Forces are considering a variety of actions, including antitrust enforcement, *amicus* briefs, and competition advocacy.

- ***State Action Task Force.*** The State Action Task Force is conducting a careful analysis of existing case law on the scope of state action immunity. The Task Force has observed that some courts have applied the doctrine overly broadly, thereby immunizing the anticompetitive conduct of parties acting in their own interest, rather than the interest of "the state itself." An overly broad application can be especially problematic when the party purportedly acting pursuant to a delegation of state authority is a private market participant with strong incentives to restrain trade. The Task Force currently is working to clarify the state action doctrine to address such problems by, for example, advocating for more rigorous enforcement of *Midcal's* "clear articulation" and "active supervision" requirements, as well as express recognition of the market participant exception.

- ***Noerr-Pennington Task Force.*** The *Noerr-Pennington* Task Force is conducting a similar analysis of existing case law regarding *Noerr-Pennington* immunity. As in the state action context, the Task Force has observed that some courts have applied the doctrine overly broadly. In some instances, parties have been granted immunity in spite of the fact that the anticompetitive conduct at issue had no "petitioning" component whatsoever. In other instances courts have immunized abusive tactics, such as repetitive lawsuits and misrepresentations, that clearly were intended to delay a competitor's entry or raise its costs, rather than to legitimately petition the government. The Task Force currently is working to clarify the *Noerr* doctrine to address such problems by, for example, advocating for express recognition of an independent misrepresentation exception and application of the *Walker Process* exception outside the patent prosecution context. Notably, the Task Force played an active role in preparation of the Commission's *amicus* brief in *In re Buspirone*, discussed above.

IV.

B2Bs and FTC E-Commerce Initiatives

A. B2B Marketplaces

Business-to-business electronic marketplaces, which use the Internet to connect businesses to each other, represent an important forum for commercial activity. In June 2000, the FTC hosted a public workshop on "Competition Policy in the World of B2B Electronic Marketplaces."[49] In October 2000, FTC staff released a report based on its learning from that workshop.[50] A second workshop was held in May 2001 to further explore these issues.[51]

In general, the Commission views positively the development of B2Bs because of their potential to generate significant efficiencies for our economy, winning for customers lower prices, improved quality and greater innovation. At the same time, we are aware of B2Bs' potential to inflict competitive harm. By their nature, B2Bs either bring together competitors in a collaborative environment, or constitute vertical collaborations between suppliers and purchasers in an industry or market. These arrangements may facilitate anticompetitive conduct, either in the markets for the goods and services traded on B2Bs (or derived from those traded on B2Bs), or in the market for marketplaces themselves. Despite B2Bs' innovative nature and their potential to revolutionize certain markets, however, the anticompetitive concerns they raise are not new; indeed, B2Bs are amenable to traditional antitrust analysis. The analysis of any B2B is highly particularized, depending heavily on such things as the B2B's operating rules, composition, exclusivity, and interoperability with other B2Bs. To date, the Commission has not formally taken enforcement action against any B2Bs since it closed its investigation of Covisint[52] in September 2000, but we stand ready to take such action if an appropriate case arises.

B. FTC E-Commerce Initiatives

- **Internet Task Force.** In August 2001, an Internet Task Force began to evaluate regulations and potentially anticompetitive business practices that could impede e-commerce. The Task Force grew out of the already-formed State Action Task Force, which had been analyzing the competitive effects of state regulations generally, and out of the FTC's longstanding interest in the competition aspects of e-commerce. Over the past year, the Task Force has met with numerous industry participants and observers, including e-retailers, trade associations, and leading scholars, and reviewed relevant literature. The Task Force discovered that many states have enacted regulations that have the effect of protecting existing bricks-and-mortar businesses from new Internet competitors. The Task Force also received reports of private companies curtailing e-commerce by employing potentially anticompetitive tactics, such as by collectively pressuring suppliers or dealers to limit sales over the Internet. To date, three advocacy filings have resulted in large part from the Task Force's efforts: (1) a joint FTC/DOJ comment before the North Carolina state bar expressing concerns about the impact on consumers of ethics opinions requiring that an attorney be physically present for all real estate closings and

refinancings; (2) a joint FTC/DOJ comment before the Rhode Island legislature on similar requirements in a real estate bill; and (3) a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.[53]

- **Internet Competition Workshop.** In October, the Commission will hold a public workshop on possible efforts to restrict competition on the Internet. The workshop will include panel discussions to address certain specific industries that are important to consumers and that have experienced some growth in commerce via the Internet, but where competition may have been hampered by state regulations or potentially anticompetitive business practices. For example, the workshop will include panels on some or all of the following industries: retailing, automobiles, cyber-charter schools, real estate, health care, wine sales, auctions, contact lenses, and caskets. The Internet Task Force expects that the workshop will (1) enhance the Commission's understanding of these issues, (2) help educate policymakers about the effects of overly restrictive state regulations, and (3) help educate private entities about the types of business practices that may or may not be viewed as problematic.

V.

International Activities: New Initiatives, Enforcement and Assistance

Because competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of our enforcement program. Given differences in laws, cultures, and priorities, it is unlikely that there will be complete convergence of antitrust policy in the foreseeable future. Areas of agreement far exceed those of divergence, however, and instances in which our differences will result in conflicting results are likely to remain rare. The agency has increased its cooperation with agencies around the world, both on individual cases and on policy issues, and is committed to addressing and minimizing policy divergences.

- **ICN and ICPAC.** Last fall, the FTC, the DOJ, and twelve other antitrust agencies from around the world launched the International Competition Network (ICN). The ICN is an outgrowth of a recommendation of the International Competition Policy Advisory Committee (ICPAC) that competition officials from developed and developing countries convene a forum in which to work together on competition issues raised by economic globalization and the proliferation of antitrust regimes. ICN provides a venue for antitrust officials worldwide to work toward consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. Sixty-one jurisdictions already have joined the ICN, and we are working on initial projects on mergers and competition advocacy.

- **Free Trade Agreement of the Americas.** The FTC is working with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas.

- **OECD.** The FTC is participating in the continuing work of the OECD on, among other things, merger process convergence, implementation of the OECD recommendation on hard-core cartels (*e.g.*, price-fixing agreements), and regulatory reform.

- **Technical Assistance.** For the past ten years, the FTC has assisted developing nations that have made the commitment to market and commercial law reforms. With funding principally from the U.S. Agency for International Development, and in partnership with the DOJ, about thirty nations have received technical assistance with development of their competition and consumer protection laws. Currently, the technical assistance program is active in South and Central America, South Africa, and Southeastern Europe. The program emphasizes the development of investigative skills, and relies on a combination of resident advisors, regional workshops, and targeted short-term missions. These activities have enabled a large number of career staff to share their expertise, although great care is taken to avoid any intrusions on time and planning for domestic enforcement projects. Future plans are focused on expanding this reimbursable program to the former Soviet Union and to Asia.

VI.

Concluding Remarks

Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace for American businesses and consumers. We believe that the Commission's antitrust enforcement has demonstrable benefits for consumers and the American economy – benefits that far outweigh the resources allocated to maintaining our competition mission. We would be pleased to respond to any questions you may have.

Endnotes

[1] The written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

[2] 15 U.S.C § 18a, *as amended*, Pub. L. No 106-553, 114 Stat. 2762 (2000).

[3] *See* 15 U.S.C. § 18a, *as amended*, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

[4] *MSC Software Corp.*, Docket No. 9299 (Oct. 10, 2001) (complaint issued) (alleging that two MSC acquisitions violated Clayton Act).

[5] *MSC Software Corp.*, Docket No. 9299 (August 14, 2002) (proposed consent order accepted for placement on public record for comment).

[6] *MSC Software Corp.*, Docket No. 9299 (Oct. 10, 2001) (complaint issued) (involving engineering software); *Chicago Bridge Iron Co., Inc.*, Docket No. 9300 (Oct. 25, 2001) (complaint issued) (pertaining to field-erected specialty industrial storage tanks).

[7] Press Release, *FTC Authorizes Suit to Block Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A.* (Oct. 23, 2001), available at <http://www.ftc.gov/opa/2001/10/diageo.htm>.

[8] *FTC v. Libbey, Inc.*, Civ. Act. No. 02-0060 (RBW) (Memorandum Opinion) (D.D.C. Apr. 22, 2002). (granting FTC's request for a preliminary injunction).

[9] Press Release, *FTC to Challenge DGF Stoess's Proposed Acquisition of Leiner Davis* (Jan. 15, 2002), available at <http://www.ftc.gov/opa/2002/01/gelatin.htm>.

[10] Press Release, *FTC Authorizes Injunction to Pre-empt Meade Instruments' Purchase of All, or Certain Assets, of Tasco Holdings, Inc.'s Celestron International* (May 29, 2002), available at <http://www.ftc.gov/opa/2002/05/meadecelestron.htm>.

[11] Press Release, *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.* (June 24, 2002), available at <http://www.ftc.gov/opa/2002/06/cytyc_digene.htm>.

[12] *See* Press Release, *FTC Initiates "Best Practices Analysis" for Merger Review Process* (Mar. 15, 2002), available at <http://www.ftc.gov/opa/2002/03/bcfaq.htm>.

[13] *See id.*

[14] *Polygram Holding, Inc.*, Docket No., 9298 (June 28, 2002) (Initial Decision), available at <http://www.ftc.gov/os/2002/06/polygramid.pdf>; *Schering Plough Corp.*, Docket No. 9297 (July 2, 2002) (Initial Decision), available at <http://www.ftc.gov/os/caselist/d9297.htm>; *Rambus Inc.*, Docket No. 9302 (June 18, 2002) (complaint), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

[15] *Warner Communications Inc.*, Dkt. No., 4025 (consent order) (Sept. 21, 2001); *Schering-Plough Corp.*, Dkt. 9297 (Apr. 5, 2002) (consent order as to American Home Products); *Biovail Corp.*, File No. 011-0094 (Apr. 23, 2002) (proposed consent order accepted for placement on public record for comment); *Physician Integrated Servs.*

of Denver, Inc., Dkt. No. 4054 (July 19, 2002) (consent order); *Aurora Associated Primary Care Physicians, L.L.C.*, Dkt. No. 4055 (July 19, 2002) (consent order); *Obstetrics and Gynecology Med. Corp. of Napa Valley*, Dkt. No. 4048 (May 17, 2002) (consent order); *Biovail Corp. and Elan Corp. PLC.*, Dkt. No., 4057 (Aug. 20, 2002) (consent order); *System Health Providers*, File No. 011-0196 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment); *Professionals in Women's Care*, File No. 011-0175 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment); and *American Institute for Conservation of Historic and Artistic Works*, File No. 011-0244 (Sept. 10, 2002) (proposed consent order accepted for placement on public record for comment).

[16] *Chevron Corp./Texaco Inc.*, Docket No. C-4023 (Jan. 2, 2002) (consent order).

[17] *Valero Energy Corp./Ultramar Diamond Shamrock Corp.*, Docket No. C-4031 (Feb. 19, 2002) (consent order).

[18] *Conoco Inc./ Phillips Petroleum Company*, File No. 0211-0040 (August 30, 2002) (proposed consent order accepted for placement on public record for comment).

[19] *Phillips Petroleum Corp./Tosco Corp.*, File No. 011-0095 (Sept. 17, 2001) (Statement of the Commission).

[20] *See* National Health Expenditures, by Source of Funds and Type of Expenditures, Health Care Financing Administration, available at <http://www.hcfa.gov/stats/nhe-oact/tables/t3.htm>.

[21] *FTC v. The Hearst Trust, The Hearst Corp., and First DataBank, Inc.*, Civ Act. No.1:01CV00734 (D.D.C. Apr. 5, 2001) (complaint).

[22] *FTC v. Hearst*, Civ. Act. No. 1:01CV00734 (D.D.C. Nov. 9, 2001) (Stipulation for Entry of Final Order and Stipulated Permanent Injunction).

[23] CONGRESSIONAL BUDGET OFFICE, HOW INCREASED COMPETITION FROM GENERIC DRUGS HAS AFFECTED PRICES AND RETURNS IN THE PHARMACEUTICAL INDUSTRY (July 1998), available at <http://www.cbo.gov>.

[24] *Id.*

[25] *See* Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 *et seq.* The Hatch-Waxman amendments were contained in the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified at 15 U.S.C. §§ 68b, 68c, 70b; 21 U.S.C. §§ 301 note, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 271, 282 (1984)).

[26] *Schering-Plough Corp.*, Dkt. 9297 (Apr. 2, 2002) (consent order as to American Home Products).

[27] *Biovail Corp.*, File No. 011-0094 (Apr. 23, 2002) (proposed consent order accepted for placement on public record for comment).

[28] *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss, available at <http://www.ftc.gov/os/2002/01/busparbrief.pdf>.

[29] *In re Buspirone*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

[30] *Biovail Corp. and Elan Corp. PLC.*, Dkt. No., 4057 (Aug. 20, 2002) (consent order).

[31] *System Health Providers*, File No. 011-0196 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment); *Professionals in Women's Care*, File No. 011-0175 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment).

[32] *Physician Integrated Servs. of Denver, Inc.*, Dkt. No. 4054 (July 19, 2002) (consent order); *Aurora Associated Primary Care Physicians, L.L.C.*, Dkt. No. 4055 (July 19, 2002) (consent order).

[33] *Obstetrics and Gynecology Med. Corp. of Napa Valley*, Dkt. No. 4048 (May 17, 2002) (consent order).

[34] *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), available at <http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>.

[35] *See* 65 Fed. Reg. 61334 (Oct. 17, 2000); 66 Fed. Reg. 12512 (Feb. 27, 2001).

[36] *Rambus Inc.*, Dkt. No. 9302 (June 18, 2002) (complaint), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

[37] *Id.*

[38] In 1996, the FTC brought a similar case against Dell Computer, alleging that Dell had failed to disclose that it had an existing patent on a personal computer component that was adopted as the standard by a video electronics group. *Dell Computer Co.*, Dkt. No. C-3658 (May 20, 1996) (consent order) (Commissioner Azcuenaga dissenting).

[39] *See* 66 Fed. Reg. 58146 (Nov. 20, 2001).

[40] *See generally*, ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1135 (4th ed. 1997) ("With few exceptions, the antitrust laws apply to all industries."); *cf. Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (implied antitrust exemptions are not favored).

[41] *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

[42] For example, section 601(b)(2) of the Telecommunications Act of 1996 repealed the FCC's ability to confer immunity to telephone company mergers that were submitted to the FCC for review, and the Department of Transportation's authority to approve domestic airline mergers expired in 1989 pursuant to 49 U.S.C. app §1551 (1988); such mergers are now subject to ordinary application of the antitrust laws.

[43] Any meeting among competitors, regardless of whether an antitrust exemption applies, carries some risk that the discussion may spill over into competitively sensitive matters. An antitrust exemption, however, may be perceived as providing some shelter for firms inclined to discuss off-limits topics, particularly when there is some interpretive flexibility as to what subject matters are reasonably "related to" the objectives of the legislation.

[44] We are aware, of course, that there have been rare instances in which Congress enacted statutory grants of immunity for joint action of competitors. In those situations, the exemption typically applied to specific industries or activities that were subject to a special regulatory regime, or to a specific transaction or agreement that had been

approved by a federal agency, again usually in the context of a regulated industry. Prior approval of an agreement by a federal agency has not been required when the scope of the immunity was very limited, but broader grants of immunity have been accompanied by strict controls on the development and implementation of agreements. Without such strict limits, the dangers of antitrust exemptions are even greater.

[45] 317 U.S. 341 (1943).

[46] 365 U.S. 127 (1961).

[47] 381 U.S. 657 (1965).

[48] American Bar Association Section of Antitrust Law, The State of Antitrust Enforcement - 2001, Report of the Task Force on the Federal Antitrust Agencies - 2001, 42 (2001), available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>.

[49] Materials related to the workshop are available at <http://www.ftc.gov/bc/b2b/index.htm>.

[50] *Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces, A Report by the Federal Trade Commission Staff (October 2000),* available at <http://www.ftc.gov/os/2000/10/b2breport.pdf>.

[51] Materials related to the workshop are available at <http://www.ftc.gov/opp/ecommerce/index.htm>.

[52] See Press Release, *FTC Terminates HSR Waiting Period for Covisint B2BVenture* (September 11, 2000), available at <http://www.ftc.gov/opa/2000/09/covisint.htm>.

[53] Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to The Honorable John B. Harwood, Speaker of the Rhode Island House of Representatives (regarding proposed bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities) (Mar. 29, 2002); Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to Ethics Committee, North Carolina State Bar (regarding North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions) (Dec. 14, 2001); and Comments of The Staff of the Federal Trade Commission, Intervenor, *In Re: Declaratory Ruling Proceeding On the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses* (Ct. Bd. Of Examiners for Opticians, Mar. 27, 2002).

NEWS RELEASE

ORRIN HATCH

United States Senator for Utah

September 19, 2002 Contact: Margarita Tapia, 202/224-5225

Statement of Senator Orrin G. Hatch
Ranking Republican Member
Before the United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition and Business and Consumer Rights
Hearing on

"Oversight of Enforcement of the Antitrust Laws"

Thank you Mr. Chairman. I commend you and Senator DeWine for all your work on this committee and for holding this hearing. This is a very important hearing. As I have noted numerous times, effective antitrust enforcement by the Antitrust Division and the Federal Trade Commission is critical in order to ensure that our markets are operating efficiently and that consumers share in the competitive benefits of our free-market system. As I have also stated previously, I feel that swift and efficient antitrust enforcement is absolutely vital to the protection of competition and innovation in our economy.

Before moving on to more substantive issues, I would like to extend a warm welcome to our distinguished witnesses, Assistant Attorney General James and Chairman Muris, and note a few of their efforts to improve the efficiency of antitrust enforcement in general – and merger review in particular. For example, following statutory reforms to the Hart-Scott-Rodino filing and merger review process, the Antitrust Division and Federal Trade Commission adopted further streamlining measures intended to appropriately tailor merger investigations and eliminate unnecessary burdens to the parties. Also, in January of this year, Assistant Attorney General James reorganized the Antitrust Division to eliminate duplication of responsibilities among various sections and task forces, and to create a structure that would better address a variety of new and emerging trends in the economy. Finally, it is my understanding that the Antitrust Division and Federal Trade Commission have been working with antitrust officials in the European Union and are close to reaching a best practices agreement between the United States federal antitrust agencies and the Commission of the European Union when simultaneously reviewing the same merger transaction. I commend you both for your efforts in these areas.

I would like to focus on a couple of specific areas of antitrust enforcement.

The first of these involves antitrust enforcement in what has come to be referred to as the "new economy." I believe that the need for effective and timely antitrust action and enforcement in the quickly-evolving, high-tech industries that make up the new economy will be one of the most important antitrust policy issues of this decade, and perhaps even of this century. It cannot be overemphasized that timing is a critical issue in examining conduct in high-tech industries. As summarized by Judge Richard Posner, "[t]he mismatch between law time and new-economy real time is troubling" in large part because "an antitrust case involving a new-economy firm may drag on for so long relative to the changing conditions of the industry as to become irrelevant [and] ineffectual." Numerous academics, as well as the D.C. Circuit, have recognized and commented on the importance of this issue.

Now, by raising this, I in no way intend to criticize either the Antitrust Division or the FTC. I am aware that one of the goals of the restructuring undertaken by Assistant Attorney General James was to organize the Antitrust Division in order to better address "new industries, network competition, and other emerging trends in the economy." And Commissioner Muris also has taken steps to increase the capabilities of the FTC to respond to antitrust issues in the high-tech arena. However, I would be interested in hearing from both witnesses about their respective efforts to ensure that potential anticompetitive behavior in high-tech sectors receives the attention and resources necessary to ensure an appropriate level of enforcement in both merger and non-merger contexts.

The second area that I would like to raise relates to the proposed satellite TV merger, which would reduce the number of direct broadcast satellite distributors from 2 to 1. For many subscription television viewers and broadband Internet subscribers, the merger would result in a real loss of choice, from two choices to one in many rural areas, such as in Utah, and from three to two in many cities. This is a considerable loss of consumer choice, and of the robust competition that has driven DBS costs down. In such a situation, alleged countervailing efficiencies need to be reviewed very carefully. The merger has been under review by the Antitrust Division and the Federal Communications Commission pending for some time, and I am sure that is because the Division and the FCC are giving the merger the attention it deserves. Nevertheless, I am hopeful that the review will be completed soon.

I am also increasingly concerned about a growing chorus of allegations of abuse by certain media companies that own both radio stations and concert venues. I have heard claims from artists and their labels that they have been required to pay for advertising on radio stations or to book affiliated concert venues to get radio air-play. I have even heard that an artist or record company must pay the radio station, through intermediaries, for air-play. These allegations are disturbing to me, and I hope that – to the extent they indicate possible antitrust violations – these allegations will receive appropriate attention.

The final area that I would like to address is that of antitrust enforcement and health care. The specific issues in this area are two numerous to mention, so I will focus on just a couple. The first involves Group Purchasing Organizations or "GPOs." I think that this is an

exceptionally important issue, and I commend Senators Kohl and DeWine for their efforts on GPOs. It is my hope that the problems and perceived problems with GPOs can be solved through voluntary actions by the GPOs rather than legislative or regulatory intervention.

Finally, I would note the FTC's activity in the area of prescription drugs and, in particular, both the FTC's enforcement and analytical efforts regarding competition issues in the application of what has become know as the Hatch-Waxman Act.

Again, I thank you Mr. Chairman and Senator DeWine for holding this important hearing. I look forward to discussing these issues with our two witnesses.

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Department of Justice

STATEMENT

OF

CHARLES A. JAMES
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION,
AND BUSINESS AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ANTITRUST ENFORCEMENT OVERSIGHT

PRESENTED ON

SEPTEMBER 19, 2002

Good morning, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice to discuss the Division and its enforcement activities to protect consumers and businesses through sound and vigorous antitrust enforcement.

As members of this Subcommittee appreciate, competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy. It has helped American consumers obtain more innovative, high-quality goods and services at lower prices; and it has strengthened the competitiveness of American businesses in the global marketplace.

That is not the same as guaranteeing the success of any particular competitor; we are not in the business of picking winners and losers, or dictating how a market should be structured. Those decisions should be made by competitive market forces. The goal of antitrust enforcement is to ensure that unlawful agreements and other anticompetitive conduct do not distort market outcomes.

Antitrust enforcement has rightly enjoyed substantial bipartisan support through the years, and we appreciate this Subcommittee's active interest in and strong support for our law enforcement mission.

In my testimony today, I will review developments in the Division's core enforcement programs and discuss policy and strategic initiatives we have undertaken over the last 15 months designed to strengthen the Division's enforcement capabilities.

Enforcement Activities

The Antitrust Division has three major enforcement programs: criminal, merger, and civil non-merger. Let me spend a few minutes detailing some of the Antitrust Division's work since my confirmation last June in each of these three major enforcement areas.

Criminal Enforcement

In the area of criminal enforcement, we move forcefully against hard-core antitrust violations such as price fixing and bid rigging. During the last 15 months, the Antitrust Division has secured almost $125 million in criminal fines, convicted 24 corporations and 25 individuals, and sentenced 25 individuals to prison terms averaging 17½ months, continuing a trend toward more certain and longer prison terms for antitrust offenders. In the last year, record-breaking jail sentences have been imposed on defendants convicted of antitrust and related offenses. These include:

- On January 22, 2002, Austin "Sonny" Shelton, a former government official in Guam, was sentenced to 10 years in jail – the longest antitrust-related jail sentence ever imposed – for orchestrating a bid-rigging, bribery, and money laundering scheme involving FEMA-funded contracts. This case was prosecuted jointly by the Antitrust Division and the U.S. Attorney's Office in Guam, and was a model for inter-agency cooperation.
- On November 9, 2001, Melvin Merberg, a former New York City food company executive, was sentenced to serve more than five years in prison for his role in multi-million dollar bid rigging, fraud, and tax conspiracies that defrauded many New York-area public and non-profit entities, including: New York City public schools; the Newark, New Jersey public schools; a Manhattan drug rehabilitation center; and Nassau County, New York jails. The fraudulent schemes affected contracts valued at more than $210 million.

The Division is not deterred in pursuing high-ranking corporate defendants engaged in illegal activity. For example, A. Alfred Taubman, former chairman of the board of Sotheby's Holdings Inc., is now serving a year and a day in prison, as well as paying a $7.5 million fine, for his role in a scheme between Sotheby's auction house and Christie's to fix the price of sellers' commissions at fine art auctions.

Restitution -- money retrieved by the Division that will go to compensate those affected by the

conspiracies involved -- reached an all-time high of over $30 million in FY 2001, as a result of convictions in the Division's New York food distribution bid-rigging cases and in a bid-rigging case involving U.S.-funded construction projects in Egypt. In the New York-area food distribution case, we secured a record criminal antitrust restitution order of $22.5 million.

We are particularly pleased with our continuing success in rooting out international cartel activity, affirming our government's resolve to protect American consumers from unlawful cartels wherever they base their operations or conduct. During the past 15 months, 54 percent of corporations prosecuted have been foreign-based, and 37 percent of individuals prosecuted have been foreign nationals. The Division now has 99 grand jury investigations open, 39 of which have international implications. In this effort, we work in close cooperation with our counterpart enforcement agencies in Europe, Canada, and elsewhere. We expect to see even more progress through these collaborations now that the European Union has brought its corporate leniency program in closer alignment with ours.

We are determined to bring violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those around the world who would victimize American consumers and the American marketplace.

Markets where the Antitrust Division has brought recent criminal prosecutions include:

- industrial chemical markets for monochloroacetic acid (MCAA), used in the production of numerous commercial and consumer products, such as pharmaceuticals, herbicides, and plastic additives;
- industrial chemical markets for organic peroxides, used in the manufacture of polyvinyl chloride, low-density polyethylene, and most polystyrene products such as containers and packaging;
- carbon cathode block, used in aluminum smelters or pots in the production of primary aluminum;

- US AID-funded construction projects for wastewater treatment in Egypt;
- nucleotides, used to enhance food flavor;
- magnetic iron oxide (MIO) particles used in the manufacture of video and audio tapes; isostatic graphite;
- tactile tile;
- scrap metal;
- printing and graphics;
- automotive tooling;
- collectible stamp auctions; and
- automotive replacement glass.

Merger Enforcement

The merger wave of recent years has subsided dramatically from its dizzying heights of a few years ago. In the past fifteen months, we have received Hart-Scott-Rodino Act ("HSR Act") filings for roughly 1500 transactions, compared to over 4500 in each of the previous two fiscal years. Part of that reduction is due to the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 2000 , which significantly raised the HSR filing thresholds. Even so, it is apparent that merger activity is down appreciably. The downturn in merger activity has been particularly acute in telecommunications, media, and technology sectors -- all of which are areas of the economy in which the Division has been active.

Despite the slowdown, there are still many mergers that require our careful review, and our staff is working hard to ensure that those transactions are receiving appropriate levels of scrutiny. In the past 15 months, the Antitrust Division has opened 131 preliminary investigations, issued second requests for

additional information to the parties in 27 of those investigations, and challenged 21 mergers. We have a number of important merger investigations ongoing, including investigations involving the DirecTV/Echostar merger, the AT&T/Comcast merger, and the Northrop Grumman/TRW merger. We will closely examine those transactions, and all mergers we review, for potential anticompetitive impacts on consumers.

Since June 2001, the Division successfully challenged 20 of the 21 transactions it deemed anticompetitive. Six of these matters were resolved by consent decree, nine through a "fix-it-first" restructuring, four were abandoned after the Division indicated that it would file suit, and one -- General Dynamics/ Newport News -- was abandoned after the Division filed suit. The Division was unsuccessful in seeking to block the Sungard/Comdisco merger, a transaction the Division asserted was likely substantially to lessen competition in the market for shared "hotsite" disaster recovery services.

The range of markets involved in these merger challenges includes airlines, airline reservation systems, banking, dairy processing, fresh bread, molded doors and doorskins, industrial rapid prototyping systems, electric power, college textbooks, computer-based testing, computer processing center "hotsite" disaster recovery services, and nuclear submarine construction.

Some of our significant merger challenges include:

- General Dynamics/Newport News. General Dynamics and Newport News were the only two nuclear-capable shipyards and the only designers and producers of nuclear submarines for the U.S. Navy. The two shipbuilders also led opposing teams to develop the next generation propulsion system for use in submarines and surface combatants, so-called electric drive. Our staff worked in close consultation with the Department of Defense, the only customer, in evaluating the transaction. Our complaint alleged that the combination would create a monopoly in nuclear submarine design and construction, and would substantially lessen competition for electric drive and surface combatants. After the parties terminated their merger agreement, Newport News received a second bid from Northrop Grumman, which did not

raise significant competitive issues.

- Suiza/Dean. Suiza and Dean were dominant firms in several geographic markets for fluid milk processing and school milk markets. The parties agreed to divest eleven dairies to National Dairy Holdings, L.P. (NDH), a newly formed partnership that is 50 percent owned by Dairy Farmers of America Inc. (DFA), a dairy farmer cooperative. The parties also agreed to modify Suiza's supply contract with DFA to ensure that dairies owned by the merged firm in the areas affected by the divestitures would be free to buy their milk from sources other than DFA.

- United/USAirways. At the time of the transaction, United and US Airways were the second and sixth largest U.S. airlines. The Division concluded that US Airways was United's most significant competitor on densely-traveled, high-revenue routes between their hubs, such as Philadelphia and Denver, as well as for nonstop travel to and from Washington D.C. and Baltimore, and on many routes up and down the East Coast. The acquisition would have given United a monopoly or duopoly on nonstop service on over 30 routes, where consumers spend over $1.6 billion annually, and would have substantially limited the competition it faced on numerous other routes representing over $4 billion in revenues. The parties abandoned the transaction after the Division indicated its intention to challenge it.

- 3D Systems/DTM. The Division concluded that the acquisition as initially proposed would have substantially lessened competition in the U.S. industrial rapid prototyping systems market by reducing the number of competitors in the U.S. market from three to two and limiting the dynamic competition that has resulted in lower prices to customers and technological improvements to rapid prototyping systems. Rapid prototyping is a process by which a machine transforms a computer design into three-dimensional objects, speeding the design process for everything from cellular phones to medical equipment. The Division filed suit to block the transaction, and subsequently reached a settlement with 3D Systems Corporation that allowed the company to go forward with its purchase of DTM Corporation, provided that 3D and DTM agreed to license their rapid prototyping patents to a company that will compete in the U.S. market. The settlement was designed to permit new entry by requiring 3D and DTM to license their rapid prototyping-related patents to a firm that will compete in the U.S. market and that currently manufactures rapid prototyping equipment.

We have also been very active in cases related to our merger enforcement program, filing two cases against "gun-jumping" and other violations of the Hart-Scott-Rodino pre-merger notification and waiting period requirements. In our case against Computer Associates International, Inc. and Platinum Technology International, Inc., we charged that the parties, who had proposed to merge and had filed

pre-merger notifications under the HSR Act, violated the requirements of the pre-merger waiting period, during which the parties must refrain from going forward with the merger pending antitrust review, as well as violating Section 1 of the Sherman Act. The parties had agreed that Platinum would limit the price discounts and other terms it offered its customers during the waiting period, and the Division alleged that Computer Associates had obtained premature operational control of Platinum.

By assuming control of Platinum before the expiration of the required waiting period, while we were investigating the legality of the proposed merger, Computer Associates prematurely reduced competition between the two companies. It is important that merging parties strictly adhere to the requirements of the HSR Act and maintain their companies as separate and independent firms during the HSR waiting period.

In April, the Division filed a proposed consent decree to settle the suit. The consent decree, which is awaiting entry by the court, requires the payment of $638,000 in civil penalties and prohibits Computer Associates from agreeing on

prices, approving or rejecting proposed customer contracts, or exchanging prospective bid information with any future merger partner.

In another case of this type, filed in October against Hearst Corporation and its parent, The Hearst Trust, we charged the company with failing to produce key documents before undertaking an acquisition subject to HSR pre-merger review. The Division filed this case, charging a violation of the HSR Act, at the request of the FTC, which was challenging the merger under section 7 of the Clayton Act. We charged that Hearst had violated the pre-merger notification requirements when it acquired Medi-Span Inc., an Indiana-based producer of integratable drug data files, in 1998 without submitting

to the antitrust enforcement agencies documents required to have been supplied along with its pre-merger notification. Hearst and its parent agreed to pay $4 million to settle the HSR charges, the largest civil penalty a company has ever paid for violating antitrust pre-merger requirements, and the court approved the settlement.

Civil Non-merger Enforcement

Let me now turn to civil non-merger enforcement. These are cases, other than criminal prosecutions, that are based on anticompetitive conduct under the Sherman Act. We have been very active in this area as well, with several cases in various stages of litigation.

As the Subcommittee is well aware, the Division's most visible conduct case is the Microsoft case. Within days of my arrival at the Division, the court of appeals rendered its decision, substantially reversing the district court's findings of liability that had formed the basis for a court-ordered breakup of the company. The court of appeals sustained DOJ's position with regard to 12 of the 20 specific acts of monopoly maintenance discussed in the opinion, but reversed the liability findings on tying, attempted monopolization and eight allegations of monopoly maintenance. Earlier in the case, the district court had dismissed allegations of monopoly leveraging and exclusive dealing. The court of appeals also vacated the remedy and ordered a hearing on the remedy before a new judge. Based upon that opinion, the Division opposed Microsoft's requests for intermediate appellate review and pressed for the earliest possible resumption of proceedings before the newly assigned trial judge. Judge Kollar-Kotelly granted our request for an early hearing, but ordered the parties to first undertake a period of around-the-clock, supervised mediation. The mediation resulted in a proposed settlement between the Division, Microsoft, and half of the state plaintiffs. The proposed consent decree is undergoing Tunney

Act review. On July 2, 2002, the district court ruled that the Division had fully complied with the Tunney Act requirements. We are now awaiting the court's public interest determination.

In our view, the proposed consent decree represents a complete and fully successful resolution of the case, in that it enjoins the conduct found to be unlawful, prevents recurrence of that conduct, and takes proactive steps to restore lost competition. Moreover, it provides for immediate relief, in that Microsoft agreed to be bound by the decree's terms upon signature. Consequently, Microsoft has already modified its licensing practices to permit computer manufacturers to substitute competing middleware products for those provided as part of its operating system, modified its new XP operating system, and begun to release important interfaces and protocols that will enable third-parties to develop products and services that will interopperate with Windows.

In the case against American Airlines for monopolizing certain routes into and out of its hub at Dallas-Fort Worth International Airport, we are pursuing an appeal from the district court's dismissal of the complaint, with oral argument in the circuit court scheduled for September 23. In the case against Visa and MasterCard, we are defending against an appeal challenging the district court's finding of partial liability. The court found against the Division on its challenge to the dual governance structure, permitting member banks to simultaneously participate in management of both networks, but found for the Division on its challenge to the practice of prohibiting members from issuing competing cards. In the case against Dentsply International for unlawfully maintaining its monopoly in the market for artificial teeth, we completed the evidentiary phase of trial in late May. We have filed post-trial briefs and proposed findings of fact and conclusions of law, and closing argument is scheduled for tomorrow, September 20.

they reflect a sufficient level of integration among the participants to support the extent of their collaboration, as well as whether the procompetitive benefits associated with the joint venture outweigh its anticompetitive risks.

Because joint ventures can raise competitive concerns, and because, unlike mergers, there are no notification and waiting period requirements, we have taken steps to position the Department for improved joint venture enforcement. Enhanced joint venture and conduct enforcement was an important goal of our structural reorganization and modernization initiatives last Fall, in that they were designed to assign specific industry responsibilities to specific sections and attorneys within the Division. In this way, our enforcement sections are tasked with monitoring business activity within the industry sectors to which they are assigned, so as to more quickly identify conduct suggesting antitrust scrutiny. The sections are also tasked with affirmative outreach in their industry sectors. We have made aggressive outreach efforts in industries in which joint ventures tend to proliferate, including the media and entertainment, agriculture, health care, and information technology. Since my arrival at the Division, we have launched a number of important joint venture investigations involving, among other things, on-line media, financial services, and electronic air passenger ticketing.

International Initiatives

Increased globalization is one of the dramatic changes taking place in our economy that is creating new challenges for antitrust enforcement. With corporations and corporate alliances stretching across the globe, we must work with antitrust enforcers abroad to forge an effective cooperative relationship based on our core beliefs in competition. We must seek convergence in procedure and substance wherever possible, to minimize the cost, complexity, and sheer uncertainty of enforcement

and compliance that could otherwise become a major hindrance to procompetitive business activity and economic growth.

For a number of years people have talked about the need for cooperation and collaboration. Now the Antitrust Division is taking aggressive steps to turn this talk into action. We have already made substantial progress and hope and expect to continue and expand that success in the future. In particular, we have strengthened our cooperative relationships with foreign antitrust authorities and worked hard promoting convergence in enforcement policies. For the first time, we have dedicated one Deputy Assistant Attorney General exclusively to international issues.

European Union

The EU currently stands as the most important antitrust enforcer outside our borders. There have been limited occasions when we haven't seen eye-to-eye with the EU. Ironically, our experience with the GE/Honeywell merger has served as a catalyst for making our relationship with the EU more substantive and more action-oriented than ever before. As a result, both sides agree that the relationship has been strengthened and improved. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, we have been able to develop largely consistent competition policies, built on sound economic foundations directed at the goal of promoting consumer welfare through competition.

It is important that other jurisdictions do not base antitrust enforcement policy on the fear that one firm's enhanced efficiency could disadvantage its competitors. Such a policy is incompatible with the fundamental precept that antitrust should protect competition, not competitors. We have both publicly and privately presented this view at every opportunity, thereby putting the issue forward to

debate and consideration in Europe and elsewhere. We are pleased that the EU has reaffirmed its commitment to consumer welfare, in the form of lower prices, higher output, and enhanced innovation, as the ultimate goal of sound competition policy, and has made clear that, like us, it views economic efficiency positively and will not punish firms for taking steps to become more efficient.

The EU also currently is reviewing its merger policies. It recently asked for comments in a so-called "Green Paper" on a broad range of issues, including on the substantive standards it should apply to mergers, to see whether to move towards the substantive standards applicable in the United States. Moreover, the EU is undertaking to adopt comprehensive merger guidelines, as we did decades ago.

One vehicle we are using to pursue our shared goals is our U.S.-EU Merger Working Group, which we reinvigorated last September following our divergence on the GE/Honeywell transaction to examine several issues, including merger process and timing, conglomerate mergers, and the role of efficiencies in merger analysis. Just recently we reached agreement through this Working Group on best practices for coordinating merger investigations subject to both U.S. and EU review. These best practices are designed to minimize the risk of divergent outcomes, facilitate coherence and compatibility in remedies, enhance investigative efficiency, and reduce burdens on those subject to multiple antitrust reviews.

An additional area in which we have made great progress toward convergence with the EU is corporate leniency. The Division's Corporate Leniency Program -- which provides for no prosecution for companies and their executives who are the first to come forward, cooperate, and meet the program's other requirements -- has played a major role in cracking the majority of the international cartels that the Division has prosecuted. The extraordinary success of this program to date has

generated widespread interest around the world. As a result, we have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. We were particularly pleased when the EC revised its leniency program in February to establish a more transparent and predictable policy along the lines of our own policy. The adoption of effective leniency programs by foreign antitrust enforcers can be tremendously beneficial to our own enforcement efforts, by making it more likely for a firm to come forward to report antitrust violations, since the firm can also receive leniency in other jurisdictions in which it might be prosecuted.

Emerging Antitrust Regimes

There are now nearly 100 national and regional antitrust regimes in the international arena, with roughly 65 of those requiring some form of pre-merger notification. While in one sense this is the result of our sustained efforts to encourage other countries to adopt and enforce antitrust laws, the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm some of the very competitive values that antitrust is meant to protect. As the nations of the world adopt and implement their own antitrust laws, we need to continue exercising leadership to prevent antitrust enforcement from being misused as a tool of industrial policy or protectionism and thereby jeopardizing the strong public and political support for sound and vigorous antitrust enforcement.

Last October we, along with the FTC, were among the lead jurisdictions in launching the International Competition Network, to develop guiding principles and best practices to be endorsed, and then implemented voluntarily. The ICN now includes 65 jurisdictions on six continents, representing over 70 percent of the world's GDP.

The ICN exists as a "virtual" network through which agency heads commission and guide the

efforts of working groups focused on specific competition law issues. The working groups themselves are directed by government personnel, but receive input from a broad range of sources, including international organizations, academics, industry groups and leaders, and private practitioners. Recommendations by the working groups will be considered by the ICN members, but implemented, if at all, through separate governmental initiatives. The ICN itself will not be a forum for reaching binding international agreements.

Our convergence efforts with other competition authorities around the world are based on six principles:

- Protect competition, not competitors.
- Recognize the central role of efficiencies in antitrust analysis.
- Base decisions on sound economics and hard evidence.
- Acknowledge the limits to our predictive capabilities.
- Be flexible and forward-looking.
- Impose no unnecessary bureaucratic costs.

The ICN has initiated two major projects in the first year of its existence. First, under the leadership of the Antitrust Division's Deputy Assistant Attorney General for International Enforcement, a Merger Working Group is dealing with several aspects of the difficult issues raised by multi-jurisdictional merger review, including merger notification and review procedures, the various analytical frameworks pursuant to which mergers are reviewed around the world, and investigative techniques.

A subgroup of 13 agencies has recommended that the entire ICN adopt broad guiding principles involving such things as transparency of merger processes, non-discrimination on the basis of

nationality, and efficient, timely, and effective merger review. This subgroup has also recommended that the ICN adopt more technical "recommended practices" such as that there should be a sufficient nexus between the transaction and the reviewing jurisdiction, and that there should be clear and objective notification thresholds. If adopted and implemented by ICN members, we will have made an important beginning in rationalizing the current thicket of multi-jurisdictional merger enforcement, in a way that well serves the competitive process worldwide. With respect to improving merger investigative processes, later this Fall we will host a conference here in Washington for merger officials from dozens of countries, with the goal of increasing understanding and pursuing healthy convergence in the practical aspects of our various merger regimes.

With respect to the second ICN initiative, the head of the Mexican antitrust agency heads a working group on the very important subject of competition advocacy, a subject that is of particular importance to developing countries and countries in transition. This working group will produce a comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unprecedented effort that should form the basis, among other things, for deriving recommended practices in the practice of competition advocacy.

And that's just the beginning. We will move on to new projects in the coming year, with the goal of further rationalizing multi-jurisdictional review and other aspects of international antitrust enforcement.

Policy Initiatives

We are undertaking work on a number of policy initiatives to ensure that we are not only up-to-date with current legal and economic analysis, but also looking to the future to prepare ourselves for the

challenges that come with changes to our economy. We are reviewing the economic and legal premises underlying several areas of enforcement policy, including intellectual property and antitrust, remedies, coordinated effects in merger enforcement, and certain discrete aspects of HSR premerger notification.

Intellectual Property Hearings

In recent years intellectual property issues have arisen with increased frequency in our merger and civil conduct investigations and enforcement actions. While intellectual property and antitrust law share the common purpose of promoting dynamic competition and thereby enhancing consumer welfare, issues at the intersection of intellectual property and antitrust can be murky. More than ever before, the creation and dissemination of intellectual property is the engine driving economic growth. Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law addresses the nature and scope of intellectual property rights, care must be taken to maintain proper incentives for the innovation and creativity on which our national economy depends.

Both we and FTC believed that a thorough review of the issues in this important area should be undertaken. We decided to hold joint hearings, with the involvement of the U.S. Patent and Trademark Office, on enforcement policy issues at the intersection of antitrust and intellectual property law. The hearings, which began in February and will be completed in the fall, have drawn from a broad cross-section of business leaders, legal practitioners, economists, and academic experts with extensive experience in these areas. We expect to publish a report in 2003, which we hope will provide new insights into the effects of competition and patent law and policy on innovation and other aspects of consumer welfare.

Remedies

The topic of remedies in merger enforcement has increasingly been discussed by members of the bar and the business community. As more and more cases, especially merger cases, were being resolved through consent decrees, remedies became a larger and larger focus of importance. The Microsoft case also raised substantial issues and debate regarding remedies in civil conduct cases.

I decided that the Division needed to undertake a thorough review of this important component of antitrust enforcement. As a result, the Division is looking at the entire remedy process, examining our guiding principles and the legal and economic basis for imposition of particular remedies, as well as administrative issues. After all, it does little good to challenge a practice or a merger as anticompetitive if the remedy you end up with at the end of the day does not protect and preserve competition -- or worse yet, if the cure is worse than the disease.

Coordinated Effects

Another ongoing policy initiative is our review -- or, rather, rediscovery -- of coordinated effects analysis. In recent years we have seen the emergence of unilateral effects as the predominant theory of economic harm pursued in government merger investigations and challenges. Unilateral effects, which focuses on the potential for the merged firm to exercise market power on its own, while a viable theory of harm, should not be the theory of choice simply by default. If we reach too quickly for unilateral effects theories to the exclusion of meaningful coordinated effects analysis -- which focuses on the potential for the merged firm to exercise market power in coordination with other firms in the market -- we might miss important cases that should be brought, or craft our relief too narrowly in cases that we actually pursue.

As a result, for the last several months I have had a team of lawyers and economists looking closely at coordinated effects analysis. Throughout this process of rediscovering coordinated effects, we will continue to draw upon the prevailing economic literature, case precedent, and case experience, as well as share our perspectives with our colleagues at the Federal Trade Commission, who are undertaking a similar endeavor. We hope that as a result of our efforts we will sharpen our analytical abilities with respect to coordinated effects analysis and enhance our effectiveness in presenting coordinated effects cases in court.

HSR Gun-jumping

An additional area that we are reviewing and in which we hope to provide additional guidance to the public is gun-jumping. The HSR Act requires that merging parties observe a mandatory 30-day waiting period (15 days in the case of a cash tender offer), after which the companies may proceed with the transaction if neither the Department of Justice nor the Federal Trade Commission requests additional information about the transaction. A primary purpose of the HSR waiting period is to prevent merging parties from combining during the pendency of an antitrust review, so that they remain separate and independent actors during that time. Section 1 of the Sherman Act, in turn, prohibits any contract, combination or conspiracy in restraint of trade. The pendency of a proposed merger thus does not excuse the merging parties of their obligations to compete independently. As a result, pending the consummation of a merger, a merging firm that attempts to or in fact controls or influences the decisions of its merger partner with regard to price, output, or some other competitively significant matter may be acting in violation of Section 1. We know that additional clarity concerning the Division's views on this issue would be helpful to the public, and as such, we have undertaken a review

of this issue. In the coming months we hope to provide additional guidance on the types of pre-consummation activities that may or may not be advisable under controlling legal precedent.

I will not detail all of our other analytical initiatives, but I would note that because so many of our enforcement actions are resolved by consent, before a court has the opportunity to render a decision, it is all the more important that we undertake this kind of critical examination periodically to ensure that the actions we bring and the remedies we seek are on as sound a doctrinal and practical footing as possible.

Strengthening the Division's Enforcement Capabilities

We are determined to uphold the high caliber of enforcement for which the Division is known. To that end, after consulting with knowledgeable people in the Division, as well as with former antitrust officials, and experienced antitrust practitioners, we have adopted a number of initiatives designed to strengthen the enforcement capabilities of the Division, including a reorganization and modernization, adopting a merger reform process initiative, increased and improved training, increased cooperation with the FTC, and adopting and expanding best practices.

Reorganization and Modernization

We sought and obtained congressional authorization earlier this year to implement a modernization effort consisting of structural and operational improvements. This effort is the first congressionally approved reorganization and modernization of the Division in more than two decades. It is designed to improve our effectiveness as enforcers by concentrating industry expertise within particular sections of the Division and giving those sections broad enforcement responsibility for both

civil merger and non-merger matters.

Under the previous, more function-based structure, multiple sections shared enforcement responsibilities for certain industries and commodities, with some sections focusing mostly on merger enforcement, and other sections concentrating on civil non-merger investigations. Business review requests in those industries and commodities, in turn, were handled in yet another part of the Division. The Division was already finding this function-based structure cumbersome, and in recent years had begun to move away from it in practice. The new structure concentrates investigatory and enforcement expertise and resources for particular industries and commodities within a particular section.

The modernization effort also recognizes the emerging importance of certain areas of the economy -- including information technology, media, telecommunications, and industries characterized by network competition -- and the need for concentrated, focused expertise in these industries. The new structure is strengthening areas of responsibility, sharpening lines of reporting, increasing accountability, and ultimately improving efficiency and productivity in carrying out the Division's mission positioning us to better address the challenges of the New Economy in the 21st Century while strengthening enforcement capability in traditional industries.

Merger Review Process Initiative

The Merger Review Process Initiative implemented last fall is designed to promote quicker identification of critical legal, factual, and economic issues, more efficient and focused discovery, and more effective evaluation of evidence. Division staff will be able to better tailor the investigation to the particular transaction, and are encouraged to consult regularly with the parties and to explore ways to reduce unnecessary burden and expense. In appropriate circumstances that could mean agreeing to

special procedures that meet the convenience and needs of the parties in exchange for the parties' cooperation in discovery. Mergers always will be a significant portion of our work and this initiative is vital to putting in place a winning merger enforcement strategy that enables us to efficiently prevent anticompetitive mergers, while not imposing unnecessary costs on businesses and the economy.

Best Practices

Following on the broad framework for investigations set forth in the Merger Review Process Initiative, we are in the process of developing, evaluating, and institutionalizing a more specific set of internal best practices for conducting merger investigations. This project will result in the creation of a best practices manual that will be a valuable tool for our staffs. The type of "self-benchmarking" reflected in the best practices initiative will allow us to embrace merger techniques that have proven successful in real investigations, while eliminating techniques that have proven unproductive.

Cooperation with the FTC/Clearance

Our landmark clearance agreement with the FTC also was part of our process of procedural reform in the merger area. By reducing the time spent in clearance disputes, more time could be spent on actual investigations during the first HSR waiting period. During its brief life, the agreement had reduced clearance to a one-day process, and for the first time in decades eliminated all pending clearance disputes. The agreement itself did not change or alter substantive antitrust enforcement, nor did it transfer industry responsibility from one agency to the other. It merely institutionalized in advance the results that should have been dictated by the pre-existing, experience-based system. Much to our disappointment, the agreement had to be voided in May of this year due to the threat of budgetary reprisals against the agencies. I appreciate the bipartisan support this Subcommittee gave our effort,

and I assure you that Chairman Muris and I remain committed to making the clearance process as efficient and effective as possible.

We have a number of broad-ranging efforts in cooperation with the FTC on-going, including the joint IP hearings, a joint DOJ/FTC/EU IP Working Group, the DOJ/FTC/EU Merger Working Group, joint efforts on a variety of HSR issues, best practices efforts, and a variety of others. I think I can safely say that the cooperative relationship between the two agencies has never been better.

Training

In any effort to strength enforcement capabilities, a central focus must always be training, so that enforcers will have the skills and ability necessary for maximum effectiveness. We have improved and expanded in-house courses covering substantive and procedural areas of antitrust law, general lawyering skills -- particularly for new attorneys -- and complex economic topics that are critical to accurate antitrust analysis in today's economy. This past winter we conducted what we anticipate will become an annual event -- the Division's Antitrust Institute -- an intensive three-day course for more junior attorneys and economists that are new to the Antitrust Division. The Antitrust Institute is designed to kick off a structured three-year training plan for new attorneys and economists that combines lectures on theory with "practice by doing" exercises. These initiatives will ensure that our attorneys and economists will develop into skilled antitrust enforcers.

Conclusion

Mr. Chairman, the men and women of the Antitrust Division approach our critical mission to enforce the U.S. antitrust laws with the utmost seriousness. Since my arrival here last June my singular goal has been to continue the excellent work that has always been done by the Division, while

positioning the agency to meet the challenges of the future. Given the important role we assign to competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our laws. While I am quite pleased with all that we have accomplished thus far, I recognize that the hallmark of any successful organization is the continuing desire to improve. In that regard I look forward to working with this Subcommittee and its staff.

STATEMENT OF SENATOR PATRICK LEAHY
HEARING OF SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMPETITION, AND BUSINESS AND CONSUMER RIGHTS:
"OVERSIGHT OF ENFORCEMENT OF THE ANTITRUST LAWS"
SEPTEMBER 19, 2002

I commend Senators Kohl and DeWine for their continuing vigilance in oversight of the enforcement of our nation's antitrust laws, and I look forward to the testimony of Chairman Muris and Assistant Attorney General James this afternoon.

Antitrust enforcement, always an important tool in ensuring that consumers enjoy the greatest quality of goods and services at the most reasonable prices, has become even more important as we move from physical to electronic marketplaces. Not only has the number and variety of goods available to any household vastly expanded, as the Internet makes its electronic inroads into American homes, but the industries that permit this expansion are growing and changing at an ever-accelerating rate. The software and hardware that permit all of us to search for, to talk about, and to purchase the myriad products now available are themselves subject to the abuses that the antitrust laws are designed to prevent.

With the rapid evolution and growth in the computer industries, with the new and innovative uses of intellectual property on the Internet in the media industries, and with the related complications involved in the use of intellectual property in many circumstances, our antitrust enforcers face more difficult challenges than those presented in the days of smokestack industries. The speed with which our new industries are growing and changing puts an additional pressure on the Department of Justice and the Federal Trade Commission to conduct their investigations into problematic behaviors and anticompetitive dealings ever more quickly, to make sure that their efforts to ensure competitive markets do not lag so far behind violations as to be ineffective.

But with that said, there are still a great many problems to be addressed in more traditional markets, and those deserve the same attention and expedition that the more high-tech issues do. Most recently, and of real importance to Vermont, I have become concerned about consolidation in the ethanol industry. As a result of the push to mandate ethanol use, Vermonters could face significant price increases at the gas pump since we are not close to ethanol refineries or processing facilities. Shrinking competition in this industry only heightens those concerns. Despite what happens with the energy bill this year, I don't think my colleagues intend for the benefits to go to just a select few companies. Since the trend in this industry has been concentration, not competition, we were and are still concerned with the recent Archer Daniels Midland – Minnesota Corn Processors merger.

Just as troubling, however, was the failure of the Department of Justice to acknowledge, much less respond to, repeated expressions of concern from members of the Senate about the possibility of anticompetitive effects in the ethanol industry in light of announced consolidations. This Committee is charged with oversight of the Department of Justice, and this Subcommittee

is responsible for the particular aspects of law enforcement engaged in by the Federal Trade Commission and the Antitrust Division. Without receiving the most basic information from the agencies necessary for us to perform those important tasks, the American public can have no assurance that the critical oversight function can possibly be performed. I have been grievously disappointed in the Department's behavior, and will continue to seek a way to ensure that it will be improved, so that we can do our jobs here.

Questions for the Record

1.) I am very disturbed by the DOJ's reluctance to respond to the concerns of this committee in a timely fashion. This seems to be a recent trend by your Department based on similar delayed responses to other inquiries from this Committee that is unacceptable. Despite writing to the Department on three different occasions since May to express our concerns about the proposed merger of Archers Daniels Midland (ADM) and Minnesota Corn Processors (MCP), we received no indication of your ongoing activities with regard to this very urgent issue. We only received a written response barely a week ago, after the Justice Department's announcement last week giving conditional approval to ADM's purchase of MCP. Why did it take so long for the Department to respond to our inquiries despite our repeated requests?

2.) How did the Department, despite your indication that a careful review of this acquisition occurred, come to the conclusion that this merger did not warrant further challenge? Your response indicated that the basis for your decision was "other relevant factors". What are these factors and how did they specifically weigh into the final decision?

3.) The pending consolidation between ADM and MCP has moved the merged firm closer to a monopoly in an already dangerously anti-competitive environment. I expressed concern over this prospect in my correspondence with the Department. Although the Department ordered MCP to divest some of its corn syrup producing assets, it did nothing to encourage competition and protect consumers in the ethanol market. What will the Department do in the future to ensure consumers are not adversely impacted by this merger?

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September 19, 2002

The Honorable Herb Kohl
U.S. Senate Committee on the Judiciary
Chairman - Subcommittee on Antitrust, Competition, and Business and Consumer Rights
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Kohl:

I understand that during today's Subcommittee hearing to examine the enforcement of anti-trust laws there may be discussion about competition in the U.S. ethanol industry. On behalf of the 65-ethanol producing companies across the country, I am writing to assure the Subcommittee that the U.S. ethanol industry is highly competitive and growing at an unprecedented rate, providing clean, home-grown energy supplies at a time when Americans are demanding a reduction in foreign oil imports.

If indeed the issue of concentration in the ethanol industry does arise, I encourage you to include in the record, a letter dated September 10, 2002 from the U.S. Department of Justice to the Honorable Patrick Leahy concerning the ethanol industry (attached). The Department of Justice stated:

> "Although market concentration, as reflected in the Herfindahl-Hirshman Index (HHI) figures, is always an important factor in our merger analyses, the Department also considers a number of other important factors in determining whether a merger is likely to substantially lessen competition. Among those other factors is entry into the market in question. For example the General Accounting Office report to which your September 5 letter refers cites 16 new producers with plants under construction as of January 2002, which will expand ethanol production capacity substantially. *After considering all relevant factors, the Department concluded* ***that the acquisition did not warrant challenge in terms of its potential affects in the ethanol market.***" *(emphasis added)*

In this case, *over 80% of the farmer-owners of Minnesota Corn Processors* (MCP) voted that it was in their best interests to merge with Archer Daniels Midland. Secondly, the U.S. Department of Justice announced that after months of review they approved the merger – without a single condition related to the ethanol market.

Finally, Archer Daniel's Midland's market share of ethanol production capacity will decrease as the ethanol industry continues to grow - even with the MCP merger, because the entire ethanol industry is growing and diversifying rapidly. Due to increased production of ethanol nationwide, on December 31, 2002, Archer Daniels Midland will have a smaller percentage of the production capacity in the marketplace than it did on January 1, 2002. Today, there are 65 ethanol plants in the United States and 12 additional plants under construction. Ethanol production will increase by 500 million gallons during the next 12 months. Furthermore, if Congress approves the fuels agreement contained in the Senate Energy Bill (H.R. 4 as amended by the Senate with 88 votes), then we anticipate 50 new ethanol facilities will be constructed over the next 10 years.

Concerns about antitrust issues and the ethanol industry are misplaced. This debate is not about ethanol; it is about creating a nationwide fuels agreement that eliminates water contaminating MTBE from the marketplace, improves air quality and lessens greenhouse gas emissions, and increases the use of domestic energy by enhancing the use of renewable fuels in the marketplace.

If you or the Members of your subcommittee have questions on this issue, please contact me at 202.289.3835.

Sincerely,

Bob Dinneen
President

Enclosure: U.S. Department of Justice Letter to Senator Patrick Leahy, dated September 10, 2002.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 10, 2002

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

Dear Senator Leahy:

This is in response to the letters you and other Senators have sent to the Attorney General expressing concern about how competition in domestic ethanol markets might be affected by certain proposed mergers.

The Department of Justice understands your concern and appreciates having the benefit of your perspective. We apologize for the delay in sending you a written response. Over the summer, the Department has been giving careful review to the proposed acquisition by Archer-Daniels-Midland Company of Minnesota Corn Processors, LLC. This past Friday, the Department filed a lawsuit challenging the merger and insisting that MCP dissolve its joint venture with Corn Products International, Inc. before the acquisition takes place. A proposed consent decree was filed along with the complaint. If approved by the court after Tunney Act proceedings, the consent decree will maintain CPI's status as an independent corn wet miller -- i.e., manufacturer of corn sweeteners -- and preserve competition in the corn wet milling market. This was the only competitive concern that the Department concluded warranted challenge under the antitrust laws.

Your letters specifically focused on ethanol markets. The Department carefully considered the potential for the proposed acquisition to harm competition in those markets. Although market concentration, as reflected in Herfindahl-Hirshman Index (HHI) figures, is always an important factor in our merger analyses, the Department also considers a number of other important factors in determining whether a merger is likely to substantially lessen competition. Among those other factors is entry into the market in question. For example, the General Accounting Office report to which your September 5 letter refers cites 16 new producers with plants under construction as of January 2002, which will expand ethanol production capacity substantially. After considering all relevant factors, the Department concluded that the acquisition did not warrant challenge in terms of its potential effects in the ethanol market.

The Department shares your interest in ensuring that ethanol and related markets remain competitive. Should Williams Energy go forward with its announced plans to sell its ethanol plants, or should any other merger or acquisition in the ethanol industry be announced, we will give appropriately careful review to the proposed transaction and, if we determine that it would substantially lessen competition in violation of the antitrust laws, you may be assured that we will take appropriate enforcement action to protect competition in the affected markets.

Thank you again for bringing your concerns to the Department's attention.

Sincerely,

Daniel J. Bryant
Assistant Attorney General